

AC

IN THE  
UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

**FILED**

JUN 17 2008 TC

**MICHAEL W. DOBBINS**  
**CLERK, U.S. DISTRICT COURT**

UNITED STATES OF AMERICA ex rel.  
THOMAS O'FARRELL,

Petitioner,

v.

EDDIE JONES,  
Warden, Pontiac Correctional Center,

Respondent.

08 C 2403

The Honorable  
Milton I. Shadur,  
Judge Presiding.

**TO THE CLERK OF THE UNITED STATES DISTRICT COURT**

The attached exhibits A through DD to respondent's Limited Answer to  
Petition for Writ of Habeas Corpus are hereby filed with this Court:

- Exhibit A: Certified Statement of Disposition, *People v. O'Farrell*, No. 95 CR 30463;
- Exhibit B: Rule 23 Order, *People v. O'Farrell*, No. 1-97-0911 (Ill.App. 1999);
- Exhibit C: PLA, *People v. O'Farrell*, No. 88841;
- Exhibit D: *People v. O'Farrell*, 724 N.E.2d 1273 (Ill. 2000) (Table);
- Exhibit E: Amended Postconviction Petition, *People v. O'Farrell*, No. 95 CR 30463;
- Exhibit F: Motion for Different Judge, *People v. O'Farrell*, No. 95 CR 30463;
- Exhibit G: Ruling on Petitioner's Motion for Different Judge, *People v. O'Farrell*, No. 95 CR 30463;

- Exhibit H: Order of Jan. 31, 2001, *People v. O'Farrell*, No. 1-00-0968 (Ill.App);
- Exhibit I: Ruling on State's Motion to Dismiss, *People v. O'Farrell*, No. 95 CR 30463;
- Exhibit J: Documents Filed in the Circuit Court of Cook County by Petitioner on Nov. 1, 2001, *People v. O'Farrell*, No. 95 CR 30463;
- Exhibit K: Report of Proceedings, *People v. O'Farrell*, No. 95 CR 30463 (Dec. 5, 2001);
- Exhibit L: Report of Proceedings, *People v. O'Farrell*, No. 95 CR 30463 (Apr. 16, 2002);
- Exhibit M: Motion for Leave to File a Late Notice of Appeal, *People v. O'Farrell*, No. 1-04-2481 (Ill.App);
- Exhibit N: Order of Sept. 7, 2004, *People v. O'Farrell*, No. 1-04-2481 (Ill.App.);
- Exhibit O: First Rule 23 Order, *People v. O'Farrell*, No. 1-04-2481 (Ill.App. 2005);
- Exhibit P: PLA, *People v. O'Farrell*, No. 101468;
- Exhibit Q: Second Rule 23 Order, *People v. O'Farrell*, No. 1-04-2481 (Ill.App. 2007);
- Exhibit R: Rule 23 Order Upon Denial of Rehearing, *People v. O'Farrell*, No. 1-04-2481 (Ill.App. 2007);
- Exhibit S: PLA, *People v. O'Farrell*, No. 105256;
- Exhibit T: *People v. O'Farrell*, 879 N.E.2d 936 (Ill. 2007) (Table);
- Exhibit U: Second Postconviction Petition, *People v. O'Farrell*, No. 95 CR 30463;
- Exhibit V: Motion to Substitute Judge for Cause, *People v. O'Farrell*, No. 95 CR 30463;
- Exhibit W: Report of Proceedings, *People v. O'Farrell*, No. 95 CF 30463 (Jul. 9, 2003);

- Exhibit X: Order Dismissing Second Postconviction Petition, *People v. O'Farrell*, No. 95 CR 30463;
- Exhibit Y: Third Postconviction Petition, *People v. O'Farrell*, No. 95 CR 30463;
- Exhibit Z: Ruling on Petitioner's Third Postconviction Petition, *People v. O'Farrell*, NO. 95 CR 30463;
- Exhibit AA: Motion to Withdraw as Counsel on Appeal, *People v. O'Farrell*, No. 1-04-1094 (Ill.App.);
- Exhibit BB: Rule 23 Order, *People v. O'Farrell*, No. 1-04-1094 (Ill.App. 2005);
- Exhibit CC: PLA, *People v. O'Farrell*, No. 101736; and
- Exhibit DD: *People v. O'Farrell*, 844 N.E.2d 970 (Ill. 2006) (Table).

June 17, 2008

Respectfully submitted,

LISA MADIGAN  
Attorney General of Illinois

By:



MICHAEL R. BLANKENHEIM, Bar # 6289072  
Assistant Attorney General  
100 West Randolph Street, 12th Floor  
Chicago, Illinois 60601-3218  
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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

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PEOPLE OF THE STATE OF ILLINOIS

VS

NUMBER 95CR3046301

THOMAS

OFARRELL

## CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

I, DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and keeper of the records and seal thereof do hereby certify that the electronic records of the Circuit Court of Cook County show that:

The States Attorney of Cook County filed an INDICTMENT/INFORMATION with the Clerk of the Circuit Court.

Charging the above named defendant with:

720-5/9-1(A)(1)	F	MURDER/INTENT TO KILL/INJ
720-5/9-1(A)(2)	F	MURDER/STRONG PROB KILL/I

The following disposition(s) was/were rendered before the Honorable Judge(s):

10/30/95 IND/INFO-CLK OFFICE-PRES JUDGE	11/13/95 1701
95CR3046301 ID# CR100870240	
11/13/95 CASE ASSIGNED	11/13/95 1726
FITZGERALD, THOMAS R.	
11/13/95 DEFENDANT IN CUSTODY	
TOOMIN, MICHAEL P.	
11/13/95 PRISONER DATA SHEET TO ISSUE	
TOOMIN, MICHAEL P.	
11/13/95 PUBLIC DEFENDER APPOINTED	
TOOMIN, MICHAEL P.	
11/13/95 DEFENDANT ARRAIGNED	
TOOMIN, MICHAEL P.	
11/13/95 PLEA OF NOT GUILTY	
TOOMIN, MICHAEL P.	
11/13/95 ADMONISH AS TO TRIAL IN ABSENT	
TOOMIN, MICHAEL P.	
11/13/95 MOTION FOR DISCOVERY	E 2
TOOMIN, MICHAEL P.	
11/13/95 CONTINUANCE BY AGREEMENT	12/08/95
TOOMIN, MICHAEL P.	
12/08/95 DEFENDANT IN CUSTODY	
TOOMIN, MICHAEL P.	
12/08/95 PRISONER DATA SHEET TO ISSUE	
TOOMIN, MICHAEL P.	
12/08/95 DEFENDANT NOT IN COURT	
TOOMIN, MICHAEL P.	
12/08/95 MOTION FOR DISCOVERY	E 1
TOOMIN, MICHAEL P.	



IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

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PEOPLE OF THE STATE OF ILLINOIS

VS

NUMBER 95CR3046301

THOMAS

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## CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

I, DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and keeper of the records and seal thereof do hereby certify that the electronic records of the Circuit Court of Cook County show that:

The States Attorney of Cook County filed an INDICTMENT/INFORMATION

12/08/95 CONTINUANCE BY AGREEMENT

01/05/96

TOOMIN, MICHAEL P.

01/05/96 DEFENDANT IN CUSTODY

TOOMIN, MICHAEL P.

01/05/96 PRISONER DATA SHEET TO ISSUE

TOOMIN, MICHAEL P.

01/05/96 CONTINUANCE BY AGREEMENT

02/02/96

TOOMIN, MICHAEL P.

02/02/96 DEFENDANT IN CUSTODY

TOOMIN, MICHAEL P.

02/02/96 PRISONER DATA SHEET TO ISSUE

TOOMIN, MICHAEL P.

02/02/96 MOTION FOR BAIL REDUCTION

D 2

TOOMIN, MICHAEL P.

02/02/96 MOTION TO QUASH ARREST

E 2

TOOMIN, MICHAEL P.

02/02/96 MOTION TO SUPPRESS EVIDENCE

E 2

TOOMIN, MICHAEL P.

02/02/96 CONTINUANCE BY AGREEMENT

02/23/96

TOOMIN, MICHAEL P.

02/23/96 DEFENDANT IN CUSTODY

TOOMIN, MICHAEL P.

02/23/96 PRISONER DATA SHEET TO ISSUE

TOOMIN, MICHAEL P.

02/23/96 CONTINUANCE BY AGREEMENT

03/29/96

TOOMIN, MICHAEL P.

03/29/96 DEFENDANT IN CUSTODY

TOOMIN, MICHAEL P.

03/29/96 PRISONER DATA SHEET TO ISSUE

TOOMIN, MICHAEL P.

03/29/96 CHANGE PRIORITY STATUS

R

TOOMIN, MICHAEL P.

03/29/96 MOTION TO SUPPRESS EVIDENCE

E 2

TOOMIN, MICHAEL P.

03/29/96 WITNESSES ORDERED TO APPEAR

03/29/96

TOOMIN, MICHAEL P.

03/29/96 CONTINUANCE BY AGREEMENT

05/23/96

TOOMIN, MICHAEL P.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

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PEOPLE OF THE STATE OF ILLINOIS

VS

NUMBER 95CR3046301

THOMAS

OFARRELL

## CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

I, DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and keeper of the records and seal thereof do hereby certify that the electronic records of the Circuit Court of Cook County show that:

The States Attorney of Cook County filed an INDICTMENT/INFORMATION		
04/04/96 NOTICE OF MOTION/FILING	05/23/96	1726
05/23/96 DEFENDANT IN CUSTODY		
TOOMIN, MICHAEL P.		
05/23/96 PRISONER DATA SHEET TO ISSUE		
TOOMIN, MICHAEL P.		
05/23/96 DEFENDANT IN CUSTODY		
TOOMIN, MICHAEL P.		
05/23/96 PRISONER DATA SHEET TO ISSUE		
TOOMIN, MICHAEL P.		
05/23/96 MOTION TO QUASH ARREST	E	2
TOOMIN, MICHAEL P.		
05/23/96 MOTION TO SUPPRESS EVIDENCE	E	2
TOOMIN, MICHAEL P.		
05/23/96 MOTION TO SUPPRESS	E	2
STATEMENTS.		
TOOMIN, MICHAEL P.		
05/23/96 WITNESSES ORDERED TO APPEAR	05/23/96	
TOOMIN, MICHAEL P.		
05/23/96 CONTINUANCE BY AGREEMENT	05/31/96	
TOOMIN, MICHAEL P.		
05/31/96 DEFENDANT IN CUSTODY		
TOOMIN, MICHAEL P.		
05/31/96 PRISONER DATA SHEET TO ISSUE		
TOOMIN, MICHAEL P.		
05/31/96 WITNESSES ORDERED TO APPEAR	05/31/96	
TOOMIN, MICHAEL P.		
05/31/96 CONTINUANCE BY AGREEMENT	06/06/96	
TOOMIN, MICHAEL P.		
06/06/96 DEFENDANT IN CUSTODY		
TOOMIN, MICHAEL P.		
06/06/96 PRISONER DATA SHEET TO ISSUE		
TOOMIN, MICHAEL P.		
06/06/96 WITNESSES ORDERED TO APPEAR		
TOOMIN, MICHAEL P.		
06/06/96 CONTINUANCE BY AGREEMENT	06/17/96	
TOOMIN, MICHAEL P.		
06/17/96 DEFENDANT IN CUSTODY		
TOOMIN, MICHAEL P.		

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

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PEOPLE OF THE STATE OF ILLINOIS

VS

NUMBER 95CR3046301

THOMAS

OFARRELL

## CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

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The States Attorney of Cook County filed an INDICTMENT/INFORMATION

06/17/96 PRISONER DATA SHEET TO ISSUE

TOOMIN, MICHAEL P.

06/17/96 CONTINUANCE BY AGREEMENT

06/20/96

TOOMIN, MICHAEL P.

06/20/96 DEFENDANT IN CUSTODY

TOOMIN, MICHAEL P.

06/20/96 PRISONER DATA SHEET TO ISSUE

TOOMIN, MICHAEL P.

06/20/96 WITNESSES ORDERED TO APPEAR

06/20/96

TOOMIN, MICHAEL P.

06/20/96 CONTINUANCE BY AGREEMENT

06/25/96

TOOMIN, MICHAEL P.

06/25/96 DEFENDANT IN CUSTODY

TOOMIN, MICHAEL P.

06/25/96 PRISONER DATA SHEET TO ISSUE

TOOMIN, MICHAEL P.

06/25/96 MOTION TO SUPPRESS EVIDENCE

S 2

AS TO THE LETTER

TOOMIN, MICHAEL P.

06/25/96 MOTION TO SUPPRESS EVIDENCE

D 2

AS TO THE GUN

TOOMIN, MICHAEL P.

06/25/96 MOTION TO QUASH ARREST

D 2

TOOMIN, MICHAEL P.

06/25/96 MOTION TO SUPPRESS

D 2

STATEMENTS.

TOOMIN, MICHAEL P.

06/25/96 CONTINUANCE BY AGREEMENT

07/15/96

TOOMIN, MICHAEL P.

07/15/96 DEFENDANT IN CUSTODY

TOOMIN, MICHAEL P.

07/15/96 PRISONER DATA SHEET TO ISSUE

TOOMIN, MICHAEL P.

07/15/96 CONTINUANCE BY AGREEMENT

08/22/96

TOOMIN, MICHAEL P.

08/09/96 MOTION TO SUPPRESS

E 2

08/09/96 HEARING DATE ASSIGNED

08/22/96 1726

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

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PEOPLE OF THE STATE OF ILLINOIS

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THOMAS

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## CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

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The States Attorney of Cook County filed an INDICTMENT/INFORMATION

08/22/96 DEFENDANT IN CUSTODY

TOOMIN, MICHAEL P.

08/22/96 PRISONER DATA SHEET TO ISSUE

TOOMIN, MICHAEL P.

08/22/96 MOTION TO SUPPRESS

D

2

STATEMENTS.

TOOMIN, MICHAEL P.

08/22/96 MOTION DEFT - CONTINUANCE - MD

09/27/96

TOOMIN, MICHAEL P.

09/27/96 DEFENDANT IN CUSTODY

TOOMIN, MICHAEL P.

09/27/96 PRISONER DATA SHEET TO ISSUE

TOOMIN, MICHAEL P.

09/27/96 CONTINUANCE BY AGREEMENT

10/15/96

TOOMIN, MICHAEL P.

10/15/96 DEFENDANT IN CUSTODY

TOOMIN, MICHAEL P.

10/15/96 PRISONER DATA SHEET TO ISSUE

TOOMIN, MICHAEL P.

10/15/96 ADMONISH PER SP CT RULE 402

TOOMIN, MICHAEL P.

10/15/96 WITNESSES ORDERED TO APPEAR

10/15/96

TOOMIN, MICHAEL P.

10/15/96 CONTINUANCE BY AGREEMENT

01/20/97

TOOMIN, MICHAEL P.

01/21/97 DEFENDANT IN CUSTODY

TOOMIN, MICHAEL P.

01/21/97 PRISONER DATA SHEET TO ISSUE

TOOMIN, MICHAEL P.

01/21/97 JURY WAIVED

TOOMIN, MICHAEL P.

01/21/97 MOTION DIRECT VERD OR FINDING

D

TOOMIN, MICHAEL P.

01/21/97 FINDING OF GUILTY

C001

TOOMIN, MICHAEL P.

01/21/97 LESSER INCLUDED OFFENSE MERGED

C002

TOOMIN, MICHAEL P.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

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PEOPLE OF THE STATE OF ILLINOIS

VS

NUMBER 95CR3046301

THOMAS

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The States Attorney of Cook County filed an INDICTMENT/INFORMATION

01/21/97 CHANGE PRIORITY STATUS

M

TOOMIN, MICHAEL P.

01/21/97 WITNESSES ORDERED TO APPEAR

01/21/97

TOOMIN, MICHAEL P.

01/21/97 CONTINUANCE BY AGREEMENT

01/24/97

TOOMIN, MICHAEL P.

01/24/97 DEFENDANT IN CUSTODY

TOOMIN, MICHAEL P.

01/24/97 PRISONER DATA SHEET TO ISSUE

TOOMIN, MICHAEL P.

01/24/97 CONTINUANCE BY AGREEMENT

01/28/97

TOOMIN, MICHAEL P.

01/24/97 CONTINUANCE BY AGREEMENT

01/28/97

TOOMIN, MICHAEL P.

01/28/97 DEFENDANT IN CUSTODY

TOOMIN, MICHAEL P.

01/28/97 PRISONER DATA SHEET TO ISSUE

TOOMIN, MICHAEL P.

01/28/97 JURY WAIVED

DEATH SENTENCING HRG.

TOOMIN, MICHAEL P.

01/28/97 MOTION DECLARE DEATH PEN UNCON

D

2

TOOMIN, MICHAEL P.

01/28/97 PRE-SENT INVEST. ORD, CONTD TO

02/24/97 1726

TOOMIN, MICHAEL P.

02/24/97 RECALL/EXEC SENT TO POLICE AGY

02/24/97 NOTICE OF APPEAL FILED, TRNSFR

02/25/97 NOTICE OF NOTICE OF APP MAILED

02/25/97 HEARING DATE ASSIGNED

02/28/97 1713

02/24/97 DEFENDANT IN CUSTODY

TOOMIN, MICHAEL P.

02/24/97 PRISONER DATA SHEET TO ISSUE

TOOMIN, MICHAEL P.

02/24/97 MOTION DEFENDANT - NEW TRIAL

D

TOOMIN, MICHAEL P.

02/24/97 DEF SENTENCED ILLINOIS DOC

C001

50 YRS

TOOMIN, MICHAEL P.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

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PEOPLE OF THE STATE OF ILLINOIS

VS

NUMBER 95CR3046301

THOMAS

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## CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

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The States Attorney of Cook County filed an INDICTMENT/INFORMATION  
02/24/97 CREDIT DEFENDANT FOR TIME SERV  
515 DYS

TOOMIN, MICHAEL P.

02/24/97 MOTION TO REDUCE SENTENCE

D

2

TOOMIN, MICHAEL P.

02/24/97 DEF ADVISED OF RIGHT TO APPEAL

TOOMIN, MICHAEL P.

02/24/97 NOTICE OF APPEAL FILED, TRNSFR

TOOMIN, MICHAEL P.

02/24/97 WARRANT QUASHED

W001

TOOMIN, MICHAEL P.

02/24/97 ORDER OF CRT, STAY OF MITTIMUS

03/20/97 1726

TOOMIN, MICHAEL P.

02/28/97 PUBLIC DEF APPTD FOR APPEAL

02/28/97 O/C FREE REPT OF PROCD ORD N/C

02/28/97 MEMO OF ORDS &amp; NOA PICKED-UP

03/12/97 REPT OF PRCDs ORD FR CRT RPT

03/13/97 APPELLATE COURT NUMBER ASGND

97-0911

03/20/97 DEFENDANT IN CUSTODY

SALONE MARCUS R.

03/20/97 LET MITTIMUS ISSUE/MITT TO ISS

SALONE MARCUS R.

06/09/97 M/D PETN FOR TRNSCT,COMLAW RCD

E

2

06/09/97 HEARING DATE ASSIGNED

06/13/97 1726

06/11/97 COMMON LAW RECORD PREPARED

06/13/97 DEFENDANT NOT IN COURT

TOOMIN, MICHAEL P.

06/13/97 M/D PETN FOR TRNSCT,COMLAW RCD

D

AND CLR DENIED

TOOMIN, MICHAEL P.

06/25/97 CLR RECD BY APP COUNSEL

PUBLIC DEFENDER

08/05/97 TRANS PROC REC/FILED CLKS OFF

08/07/97 REPORT OF PROCEEDINGS PREPARED

08/13/97 REPRT/PROCDS RECD BY APP ATTRY

PUBLIC DEFENDER

09/23/97 HEARING DATE ASSIGNED

09/30/97 1726

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

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PEOPLE OF THE STATE OF ILLINOIS

VS

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THOMAS

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## CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

I, DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and keeper of the records and seal thereof do hereby certify that the electronic records of the Circuit Court of Cook County show that:

The States Attorney of Cook County filed an INDICTMENT/INFORMATION

09/30/97 DEFENDANT NOT IN COURT

TOOMIN, MICHAEL P.

09/30/97 SPECIAL ORDER

MOTION TO CHANGE PROTECTION CUSTODY DEINED

TOOMIN, MICHAEL P.

01/27/98 SUPPL REPORT OF PRCD PREPARED

01/27/98 SUPPL REC RECD BY APPL COUNSEL

STATE APPELLATE DEFENDER

05/26/99 MANDATE FILED

06/09/99 1701

06/09/99 REVIEW COURT AFFIRMANCE

AS MODIFIED

FITZGERALD, THOMAS R.

06/16/99 MANDATE FILED

06/25/99 1701

06/25/99 MANDATE RECALLED

05/25/99

CLAY, EVELYN B.

10/25/99 DEFENDANT IN CUSTODY

TOOMIN, MICHAEL P.

10/25/99 PRISONER DATA SHEET TO ISSUE

TOOMIN, MICHAEL P.

10/25/99 HABEAS CORPUS PETITION FILED

TOOMIN, MICHAEL P.

10/25/99 CONTINUANCE BY AGREEMENT

10/27/99

TOOMIN, MICHAEL P.

11/01/99 HABEAS CORPUS PETITION FILED

F 2

11/01/99 HEARING DATE ASSIGNED

11/05/99 1726

APPT. OF COUNSEL

11/02/99 HABEAS CORPUS PETITION DENIED

D 2

TOOMIN, MICHAEL P.

11/02/99 SPECIAL ORDER

MOTION TO PROCEED IN FORMA PAUPERIS DENIED

TOOMIN, MICHAEL P.

11/02/99 SPECIAL ORDER

D

MOTION TO APPOINT COUNSEL DENIED

TOOMIN, MICHAEL P.

11/05/99 PREVIOUS ORDER TO STAND

11/02/99

TOOMIN, MICHAEL P.

12/14/99 NOTICE OF APPEAL FILED, TRNSFR

00/00/00

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

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PEOPLE OF THE STATE OF ILLINOIS

VS

NUMBER 95CR3046301

THOMAS

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## CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

I, DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and keeper of the records and seal thereof do hereby certify that the electronic records of the Circuit Court of Cook County show that:

The States Attorney of Cook County filed an INDICTMENT/INFORMATION	
01/18/00 NOTICE OF NOTICE OF APP MAILED	00/00/00
01/18/00 HEARING DATE ASSIGNED	01/21/00 1713
01/26/00 POST-CONVICTION FILED	CALL 02/04/00 1701
01/26/00 PAUPER PETITION FILED	02/04/00 1701
01/26/00 HEARING DATE ASSIGNED	02/04/00 1701
01/21/00 PUBLIC DEF APPTD FOR APPEAL	00/00/00
01/21/00 O/C FREE REPT OF PROCD ORD N/C	00/00/00
01/21/00 MEMO OF ORDS & NOA PICKED-UP	00/00/00
02/04/00 CASE ASSIGNED	02/04/00 1726
WOOD, WILLIAM S.	
02/04/00 CONTINUANCE BY ORDER OF COURT	02/07/00
TOOMIN, MICHAEL P.	
02/07/00 TRANSFERRED	02/08/00 1712
TOOMIN, MICHAEL P.	
02/08/00 CONTINUANCE BY ORDER OF COURT	02/09/00
MOORE, COLLEEN MCSWEENEY	
02/09/00 CONTINUANCE BY ORDER OF COURT	02/15/00
MOORE, COLLEEN MCSWEENEY	
02/15/00 SPECIAL ORDER	00/00/00
MOTION FOR DIFFERENT JUDGE TO CONSIDERED IS HE RD & DENIED	
MOORE, COLLEEN MCSWEENEY	
02/15/00 TRANSFERRED	02/15/00 1726
MOORE, COLLEEN MCSWEENEY	
02/10/00 REPT OF PRCDs ORD FR CRT RPT	00/00/00
02/22/00 CONTINUANCE BY ORDER OF COURT	03/15/00
TOOMIN, MICHAEL P.	
03/09/00 MANDATE FILED	03/21/00 1701
03/21/00 REVIEW COURT AFFIRMANCE	00/00/00
AS MODIFIED	
WOOD, WILLIAM S.	
04/24/00 DEFENDANT NOT IN COURT	00/00/00
TOOMIN, MICHAEL P.	
04/24/00 DEFENDANT IN CUSTODY	00/00/00
TOOMIN, MICHAEL P.	
04/24/00 APPEARANCE FILED	00/00/00
TOOMIN, MICHAEL P.	
04/24/00 CONTINUANCE BY AGREEMENT	07/12/00
TOOMIN, MICHAEL P.	



IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

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PEOPLE OF THE STATE OF ILLINOIS

VS

NUMBER 95CR3046301

THOMAS

OFARRELL

## CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

I, DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and keeper of the records and seal thereof do hereby certify that the electronic records of the Circuit Court of Cook County show that:

The States Attorney of Cook County filed an INDICTMENT/INFORMATION

04/14/00 NOTICE OF APPEAL FILED, TRNSFR	00/00/00	
04/25/00 NOTICE OF NOTICE OF APP MAILED	00/00/00	
04/25/00 HEARING DATE ASSIGNED	04/28/00	1713
04/28/00 SPECIAL ORDER	00/00/00	
PRO SE		
04/28/00 FREE REPORT OF PRCDs DENIED	00/00/00	
04/28/00 MEMO OF ORDS & NOA PICKED-UP		
05/09/00 APPELLATE COURT NUMBER ASGND	00/00/00	00-0968
05/17/00 TRANS PROC REC/FILED CLKS OFF	00/00/00	
05/22/00 COMMON LAW RECORD PREPARED	00/00/00	
05/22/00 REPORT OF PROCEEDINGS PREPARED	00/00/00	
06/28/00 ILL STATE APPELLATE DEF APPTD	00/00/00	
PER APPELLATE COURT ORDER DATED JUNE 7, 2000		
06/29/00 CLR RECD BY APP COUNSEL	00/00/00	
STATE APPELLATE DEFENDER		
06/29/00 REPRT/PROCDS RECD BY APP ATTRY	00/00/00	
STATE APPELLATE DEFENDER		
07/12/00 DEFENDANT NOT IN COURT	00/00/00	
TOOMIN, MICHAEL P.		
07/12/00 CONTINUANCE BY AGREEMENT	08/14/00	
TOOMIN, MICHAEL P.		
08/14/00 DEFENDANT NOT IN COURT	00/00/00	
TOOMIN, MICHAEL P.		
08/14/00 DEFENDANT IN CUSTODY	00/00/00	
TOOMIN, MICHAEL P.		
08/14/00 CONTINUANCE BY AGREEMENT	10/10/00	
TOOMIN, MICHAEL P.		
04/28/00 REPT OF PRCDs ORD FR CRT RPT	00/00/00	
10/10/00 DEFENDANT NOT IN COURT	00/00/00	
TOOMIN, MICHAEL P.		
10/10/00 CONTINUANCE BY AGREEMENT	12/05/00	
TOOMIN, MICHAEL P.		
12/05/00 DEFENDANT IN CUSTODY	00/00/00	
TOOMIN, MICHAEL P.		
12/05/00 PRISONER DATA SHEET TO ISSUE	00/00/00	
TOOMIN, MICHAEL P.		
12/05/00 CONTINUANCE BY AGREEMENT	01/09/01	
TOOMIN, MICHAEL P.		

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Page 011

PEOPLE OF THE STATE OF ILLINOIS

VS

NUMBER 95CR3046301

THOMAS

OFARRELL

## CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

I, DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and keeper of the records and seal thereof do hereby certify that the electronic records of the Circuit Court of Cook County show that:

The States Attorney of Cook County filed an INDICTMENT/INFORMATION

01/09/01 DEFENDANT NOT IN COURT	00/00/00
TOOMIN, MICHAEL P.	
01/09/01 CONTINUANCE BY AGREEMENT	03/07/01
TOOMIN, MICHAEL P.	
03/07/01 DEFENDANT NOT IN COURT	00/00/00
TOOMIN, MICHAEL P.	
03/07/01 CONTINUANCE BY AGREEMENT	03/19/01
TOOMIN, MICHAEL P.	
03/19/01 CONTINUANCE BY AGREEMENT	03/26/01
TOOMIN, MICHAEL P.	
03/26/01 CONTINUANCE BY ORDER OF COURT	04/13/01
URSO, JOSEPH J.	
04/03/01 MANDATE FILED	04/12/01 1701
04/12/01 SPECIAL ORDER	00/00/00
APPELLANTS MOTION TO WITHDRAW APPEAL IS ALLOWE	
WOOD, WILLIAM S.	
04/13/01 DEFENDANT NOT IN COURT	00/00/00
TOOMIN, MICHAEL P.	
04/13/01 DEFENDANT IN CUSTODY	00/00/00
TOOMIN, MICHAEL P.	
04/13/01 SPECIAL ORDER	00/00/00
LLV TO FILE AMENDED PC	
TOOMIN, MICHAEL P.	
04/13/01 CONTINUANCE BY AGREEMENT	05/30/01
TOOMIN, MICHAEL P.	
05/07/01 SPECIAL ORDER	00/00/00
AMENDMENT TO AMENDED P. C. PET.	
05/30/01 DEFENDANT IN CUSTODY	00/00/00
TOOMIN, MICHAEL P.	
05/30/01 PRISONER DATA SHEET TO ISSUE	00/00/00
TOOMIN, MICHAEL P.	
05/30/01 SPECIAL ORDER	00/00/00
LV STATE TO FILE MOTION TO DISMISS	
TOOMIN, MICHAEL P.	
05/30/01 CONTINUANCE BY AGREEMENT	06/28/01
TOOMIN, MICHAEL P.	
06/28/01 DEFENDANT NOT IN COURT	00/00/00
TOOMIN, MICHAEL P.	

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Page 012

PEOPLE OF THE STATE OF ILLINOIS

VS

NUMBER 95CR3046301

THOMAS

OFARRELL

## CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

I, DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and keeper of the records and seal thereof do hereby certify that the electronic records of the Circuit Court of Cook County show that:

The States Attorney of Cook County filed an INDICTMENT/INFORMATION

06/28/01 DEFENDANT IN CUSTODY	00/00/00	
TOOMIN, MICHAEL P.		
06/28/01 SPECIAL ORDER	00/00/00	
PETION TO FILE RESPONSE TO STATES MOTION TO DI MISS		
TOOMIN, MICHAEL P.		
06/28/01 WITNESSES ORDERED TO APPEAR	00/00/00	
TOOMIN, MICHAEL P.		
06/28/01 CONTINUANCE BY AGREEMENT	08/22/01	
TOOMIN, MICHAEL P.		
08/22/01 DEFENDANT NOT IN COURT	00/00/00	
TOOMIN, MICHAEL P.		
08/22/01 SPECIAL ORDER	00/00/00	
HRG. ON MOT/DIS AMENDED E & C		
TOOMIN, MICHAEL P.		
08/22/01 CONTINUANCE BY AGREEMENT	10/04/01	
TOOMIN, MICHAEL P.		
10/04/01 DEFENDANT NOT IN COURT	00/00/00	
TOOMIN, MICHAEL P.		
10/04/01 SPECIAL ORDER	00/00/00	
MOT/DIS AMENDED PET. PCR GRANTED		
TOOMIN, MICHAEL P.		
10/11/01 DEFENDANT NOT IN COURT	00/00/00	
TOOMIN, MICHAEL P.		
10/11/01 DEFENDANT IN CUSTODY	00/00/00	
TOOMIN, MICHAEL P.		
10/11/01 SPECIAL ORDER		
PET. & ORDER FOR ATTY/ FEES APPROVAL IN AMT. OF \$2,485.27		
TOOMIN, MICHAEL P.		
11/30/01 M/D PETN FOR TRNSCT, COMLAW RCD	00/00/00 F	2
11/30/01 PAUPER PETITION FILED	00/00/00 F	2
11/30/01 HEARING DATE ASSIGNED	12/05/01 1726	
12/05/01 SPECIAL ORDER	00/00/00	
MOTION DENIED		
TOOMIN, MICHAEL P.		
04/11/02 SPECIAL ORDER	00/00/00 F	2
COMPEL CLERK/FILE DEFTS AFFIDV OF INTENT/ TO F LE APPEAL.		
04/11/02 HEARING DATE ASSIGNED	04/16/02 1726	

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

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PEOPLE OF THE STATE OF ILLINOIS

VS

NUMBER 95CR3046301

THOMAS

OFARRELL

## CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

I, DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and keeper of the records and seal thereof do hereby certify that the electronic records of the Circuit Court of Cook County show that:

The States Attorney of Cook County filed an INDICTMENT/INFORMATION

04/16/02 DEFENDANT NOT IN COURT	00/00/00		
TOOMIN, MICHAEL P.			
04/16/02 DEFENDANT IN CUSTODY	00/00/00		
TOOMIN, MICHAEL P.			
04/16/02 SPECIAL ORDER	00/00/00		
MTN TO COMPEL CLERK'S OFFICE TO FILE APPEAL IS DENIED. CLERK TO NOTIFY.			
TOOMIN, MICHAEL P.			
07/24/02 M/D PETN FOR TRNSCT, COMLAW RCD	00/00/00	F	2
07/24/02 HEARING DATE ASSIGNED	08/01/02	1726	
08/01/02 FREE REPORT OF PRCDs DENIED	00/00/00	D	2
CLERK TO NOTIFY			
TOOMIN, MICHAEL P.			
05/28/03 POST-CONVICTION FILED	00/00/00		
05/28/03 HEARING DATE ASSIGNED	06/04/03	1701	
06/04/03 CASE ASSIGNED	06/04/03	1726	
BIEBEL, PAUL JR.			
06/04/03 CONTINUANCE BY ORDER OF COURT	06/09/03		
EGAN, JAMES D.			
06/09/03 CONTINUANCE BY ORDER OF COURT	06/11/03		
EGAN, JAMES D.			
06/11/03 CONTINUANCE BY ORDER OF COURT	07/16/03		
TOOMIN, MICHAEL P.			
07/09/03 MOTION S.O.J.-FOR CAUSE-FILED	00/00/00	S	2
TOOMIN, MICHAEL P.			
07/09/03 TRANSFERRED	07/09/03	1712	
TOOMIN, MICHAEL P.			
07/09/03 MOTION TO SUBSTITUTE JUDGE	00/00/00	D	2
MOORE, COLLEEN MCSWEENEY			
07/09/03 TRANSFERRED	07/09/03	1726	
MOORE, COLLEEN MCSWEENEY			
07/10/03 CONTINUANCE BY ORDER OF COURT	07/16/03		
GEARY, ADRIENNE M.			
07/16/03 CONTINUANCE BY ORDER OF COURT	07/24/03		
TOOMIN, MICHAEL P.			
07/24/03 POST-CONV PETITION DENIED	00/00/00		
TOOMIN, MICHAEL P.			
07/25/03 NOTIFICATION SENT TO DEFENDANT	00/00/00		

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

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PEOPLE OF THE STATE OF ILLINOIS

VS

NUMBER 95CR3046301

THOMAS

OFARRELL

## CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

I, DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and keeper of the records and seal thereof do hereby certify that the electronic records of the Circuit Court of Cook County show that:

The States Attorney of Cook County filed an INDICTMENT/INFORMATION

08/12/03 NOTICE OF APPEAL FILED, TRNSFR	00/00/00	
08/19/03 NOTICE OF NOTICE OF APP MAILED	00/00/00	
08/19/03 HEARING DATE ASSIGNED	08/22/03	1713
08/22/03 ILL STATE APPELLATE DEF APPTD	00/00/00	
BIEBEL, PAUL JR.		
08/22/03 O/C FREE REPT OF PROCD ORD N/C	00/00/00	
BIEBEL, PAUL JR.		
08/22/03 MEMO OF ORDS & NOA PICKED-UP	00/00/00	
BIEBEL, PAUL JR.		
09/11/03 APPELLATE COURT NUMBER ASGND	00/00/00	03-2619
09/08/03 REPT OF PRCD ORD FR CRT RPT	00/00/00	
08/12/03 NOTICE OF APPEAL FILED, TRNSFR	00/00/00	
11/04/03 NOTICE OF NOTICE OF APP MAILED	00/00/00	
11/04/03 HEARING DATE ASSIGNED	11/07/03	1713
11/07/03 POST-CONVICTION FILED	00/00/00	
11/07/03 HEARING DATE ASSIGNED	11/17/03	1701
11/17/03 CASE ASSIGNED	11/17/03	1726
CRANE, CLAYTON J.		
11/17/03 DEFENDANT NOT IN COURT	00/00/00	
TOOMIN, MICHAEL P.		
11/17/03 PRISONER DATA SHEET TO ISSUE	00/00/00	
TOOMIN, MICHAEL P.		
11/17/03 CONTINUANCE BY ORDER OF COURT	12/17/03	
TOOMIN, MICHAEL P.		
11/07/03 ILL STATE APPELLATE DEF APPTD	00/00/00	
BIEBEL, PAUL JR.		
11/07/03 O/C FREE REPT OF PROCD ORD N/C	00/00/00	
BIEBEL, PAUL JR.		
11/07/03 MEMO OF ORDS & NOA PICKED-UP	00/00/00	
BIEBEL, PAUL JR.		
11/21/03 APPELLATE COURT NUMBER ASGND	00/00/00	03-3404
12/17/03 DEFENDANT IN CUSTODY	00/00/00	
TOOMIN, MICHAEL P.		
12/17/03 PRISONER DATA SHEET TO ISSUE	00/00/00	
TOOMIN, MICHAEL P.		
12/17/03 CONTINUANCE BY ORDER OF COURT	01/07/04	
TOOMIN, MICHAEL P.		

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

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PEOPLE OF THE STATE OF ILLINOIS

VS

NUMBER 95CR3046301

THOMAS

OFARRELL

## CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

I, DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and keeper of the records and seal thereof do hereby certify that the electronic records of the Circuit Court of Cook County show that:

The States Attorney of Cook County filed an INDICTMENT/INFORMATION	
12/26/03 TRANS PROC REC/FILED CLKS OFF	00/00/00
12/30/03 SUPPL REPORT OF PRCD PREPARED	00/00/00
01/02/04 SPECIAL ORDER	00/00/00
TOOMIN, MICHAEL P.	
01/02/04 SPECIAL ORDER	00/00/00
TOOMIN, MICHAEL P.	
01/02/04 SPECIAL ORDER	00/00/00
PETITION PCR DEMANDS PE ORDER FILES STAMP DATE	
TOOMIN, MICHAEL P.	
01/02/04 SPECIAL ORDER	00/00/00
MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS S DENIED	
TOOMIN, MICHAEL P.	
01/06/04 NOTIFICATION SENT TO DEFENDANT	00/00/00
01/07/04 DEFENDANT IN CUSTODY	00/00/00
TOOMIN, MICHAEL P.	
01/07/04 PRISONER DATA SHEET TO ISSUE	00/00/00
TOOMIN, MICHAEL P.	
01/07/04 PREVIOUS ORDER TO STAND	01/02/04
TOOMIN, MICHAEL P.	
01/08/04 SUPPL REC RECD BY APPL COUNSEL	00/00/00
STATE APPELLATE DEFENDER	
01/23/04 COMMON LAW RECORD PREPARED	00/00/00
01/23/04 REPORT OF PROCEEDINGS PREPARED	00/00/00
01/27/04 CLR RECD BY APP COUNSEL	00/00/00
STATE APPELLATE DEFENDER	
01/27/04 REPT/PROCDS RECD BY APP ATTRY	00/00/00
STATE APPELLATE DEFENDER	
01/29/04 SUPPL REPORT OF PRCD PREPARED	00/00/00
02/03/04 SUPPL REC RECD BY APPL COUNSEL	00/00/00
STATE APPELLATE DEFENDER	
02/17/04 REPT OF PRCD ORD FR CRT RPT	00/00/00
04/23/04 ILL STATE APPELLATE DEF APPTD	00/00/00
BIEBEL, PAUL JR.	
04/23/04 O/C FREE REPT OF PROCD ORD N/C	00/00/00
BIEBEL, PAUL JR.	
04/23/04 MEMO OF ORDS & NOA PICKED-UP	00/00/00
BIEBEL, PAUL JR.	

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

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PEOPLE OF THE STATE OF ILLINOIS

VS

NUMBER 95CR3046301

THOMAS

OFARRELL

## CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

I, DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and keeper of the records and seal thereof do hereby certify that the electronic records of the Circuit Court of Cook County show that:

The States Attorney of Cook County filed an INDICTMENT/INFORMATION

05/19/04 REPT OF PRCDs ORD FR CRT RPT	00/00/00
06/02/04 MANDATE FILED	06/11/04 1701
06/11/04 SPECIAL ORDER	00/00/00

DEFENDANTS MOTION TO DISMISS APPEAL ALLOWED

BIEBEL, PAUL JR.

06/17/04 SUPP TRAN PRO REC/FILE CLK OFF	00/00/00
06/25/04 SUPPL REC RECD BY APPL COUNSEL	00/00/00
STATE APPELLATE DEFENDER	
06/22/04 SUPPL REPORT OF PRCD PREPARED	00/00/00
09/03/04 SUPP TRAN PRO REC/FILE CLK OFF	00/00/00
09/22/04 SUPPL REPORT OF PRCD PREPARED	00/00/00
09/21/04 NOTICE OF APPEAL FILED, TRNSFR	00/00/00
09/29/04 NOTICE OF NOTICE OF APP MAILED	00/00/00
09/29/04 HEARING DATE ASSIGNED	10/01/04 1713
09/23/04 SUPPL REC RECD BY APPL COUNSEL	00/00/00

STATE APPELLATE DEFENDER

10/01/04 ILL STATE APPELLATE DEF APPTD	00/00/00
BIEBEL, PAUL JR.	

10/01/04 O/C FREE REPT OF PROCD ORD N/C	00/00/00
BIEBEL, PAUL JR.	

10/01/04 MEMO OF ORDS & NOA PICKED-UP	00/00/00
BIEBEL, PAUL JR.	

10/08/04 APPELLATE COURT NUMBER ASGND	00/00/00	04-2481
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11/23/04 REPT OF PRCDs ORD FR CRT RPT	00/00/00
12/09/04 MANDATE FILED	12/20/04 1701
12/20/04 SPECIAL ORDER	00/00/00

DEFENDANT MOTION TO DISMISS APPEAL ALLOWED

BIEBEL, PAUL JR.

12/22/04 SUPPL REPORT OF PRCD PREPARED	00/00/00
12/28/04 SUPPL REC RECD BY APPL COUNSEL	00/00/00
STATE APPELLATE DEFENDER	

12/28/04 SUPPL REC RECD BY APPL COUNSEL	00/00/00
STATE APPELLATE DEFENDER	

01/04/05 REPT OF PRCDs ORD FR CRT RPT	00/00/00
02/17/05 COMMON LAW RECORD PREPARED	00/00/00
02/17/05 CLR RECD BY APP COUNSEL	00/00/00

STATE APPELLATE DEFENDER

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

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PEOPLE OF THE STATE OF ILLINOIS

VS

NUMBER 95CR3046301

THOMAS

OFARRELL

## CERTIFIED STATEMENT OF CONVICTION / DISPOSITION

I, DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and keeper of the records and seal thereof do hereby certify that the electronic records of the Circuit Court of Cook County show that:

The States Attorney of Cook County filed an INDICTMENT/INFORMATION

03/14/05 TRANS PROC REC/FILED CLKS OFF	00/00/00
03/16/05 SUPPL REC RECD BY APPL COUNSEL	00/00/00
STATE APPELLATE DEFENDER	
03/14/05 SUPPL REPORT OF PRCD PREPARED	00/00/00
03/28/05 REPORT OF PROCEEDINGS PREPARED	00/00/00
04/06/05 REPRT/PROCDS RECD BY APP ATTRY	00/00/00
STATE APPELLATE DEFENDER	
04/06/05 SUPPL REC RECD BY APPL COUNSEL	00/00/00
STATE APPELLATE DEFENDER	
06/24/05 SUPP TRAN PRO REC/FILE CLK OFF	00/00/00
06/30/05 SUPPL REPORT OF PRCD PREPARED	00/00/00
07/14/05 SUPPL REC RECD BY APPL COUNSEL	00/00/00
STATE APPELLATE DEFENDER	
02/28/06 MANDATE FILED	03/10/06 1701
03/10/06 REVIEW COURT AFFIRMANCE	00/00/00
BIEBEL, PAUL JR.	
07/18/07 MANDATE FILED	07/27/07 1701
04-2481	
07/27/07 REVIEW COURT AFFIRMANCE	00/00/00
GAINER THOMAS V JR.	
07/24/07 MANDATE FILED	08/03/07 1701
04-2481	
08/03/07 MANDATE RECALLED	00/00/00
GAINER THOMAS V JR.	
01/17/08 MANDATE FILED	01/31/08 1701
04-2481	
01/31/08 REVIEW COURT AFFIRMANCE	00/00/00
BIEBEL, PAUL JR.	



I hereby certify that the foregoing has been entered of record on the above captioned case.

Date 05/08/08

Dorothy Brown  
 DOROTHY BROWN  
 CLERK OF THE CIRCUIT COURT OF COOK COUNTY





**NOTICE**

The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

No. 1--97--0911

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

---

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 95 CR 30463
	)	
THOMAS O'FARRELL,	)	Honorable
	)	Michael Toomin
Defendant-Appellant.	)	Judge Presiding.

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O R D E R

Following a bench trial, defendant Thomas O'Farrell was convicted of first degree murder and sentenced to 50 years' imprisonment. On appeal, defendant contends that: (1) his sentence was excessive; (2) he should not have been subject to the truth-in-sentencing law because it violates the single subject rule of the Illinois Constitution; and (3) the mittimus should be amended to reflect that he was convicted and sentenced for only one count of first degree murder. For the reasons set forth below, we affirm and modify the mittimus.

In the early morning hours of September 28, 1995, defendant's wife, Lesley O'Farrell, was shot and killed by two gunshot wounds,

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one to her head and the other to her chest. Defendant, who was 31 years old at the time, was charged by indictment with first degree murder of his wife. Defendant waived his right to a jury trial. Prior to trial, the court denied defendant's motions to quash his arrest and suppress his statements. The trial court also denied defendant's motion to suppress physical evidence with respect to a firearm the police found, but granted the motion with respect to a letter written by defendant's wife which had been taken off of a dresser by the police. The trial court also denied defendant's motion to suppress statements he made about why he shot his wife to Thomas Dye, a police informant, while both were being held in the Cook County jail.

At defendant's trial, Chicago police officer Veronica Pettry testified that she and her partner, Peter Maderer, received a radio call at 4:20 a.m. that a shooting or a burglary was in progress at defendant's address. When they arrived at defendant's house, the front door was open and defendant was sitting with his son on the base of a staircase inside the house. Defendant was bleeding from a gunshot wound and he told Officers Pettry and Maderer that he and his wife had been shot in their bedroom. Defendant described the shooter as "a six-foot-three inch, black man with short black hair, approximately 200 pounds." Defendant also stated that he thought his wife was dead and asked Pettry and Maderer to check on her. While Maderer checked the upstairs bedroom, defendant told Pettry that "he was sleeping, and he awoke, he heard a loud boom, which he

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suspected was a gunshot. And as he awoke, he saw this six-foot-three, 200 pound black man offender." After Maderer checked the upstairs master bedroom of the house and confirmed that defendant's wife was dead, Pettry and Maderer asked defendant how he became injured. Defendant told them he "tried to disarm the offender" and a struggle ensued from the bedroom and continued outside into the hallway, "at which time the gun went off." Defendant further told Pettry and Maderer that he thought that the offender had been shot in the stomach. Officer Maderer then searched the house to see if the intruder was still present but did not find him. When an ambulance arrived at the house, Pettry and Maderer told defendant to get medical treatment and that they would look around for more clues and check to see if there was anything missing.

Chicago police officer Ronald Cooper testified that he rode with defendant, who appeared to be injured in his shoulder, and defendant's son in the ambulance to the hospital. While in the ambulance, defendant told Cooper that "while he was sleeping he heard a loud noise followed by a second loud noise. At that time he awoke, and he observed \*\*\* [a] male black in his bedroom standing over his wife." Defendant also told Cooper that he "jumped out of his bed, and he grabbed the male black in his bedroom and they began to wrestle." Just outside the bedroom, in the hallway, two shots were fired. Defendant thought the black man was shot and one shot had struck defendant in the shoulder. Defendant also told Cooper that the black man ran down the stairs

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and out the door next to the kitchen, and defendant followed the man out of the house onto the street.

Chicago police detective William Kernan testified that he was assigned to go to the hospital and interview defendant. Defendant told Kernan that he was employed as a truck driver, got off work at 10:30 p.m. on September 27, 1998, stopped at a bar for a few beers, and left at approximately 11 p.m. Defendant also told Detective Kernan that he briefly spoke with his wife before going to bed and she told him that their two dogs had been barking. Defendant further told Kernan the same story he had told the other officers at his house and in the ambulance about how he and his wife had been shot.

Chicago police officer Patrick Moran testified that he was assigned to investigate the scene of the murder. Officer Moran stated that "[a] pane of the window [from the first floor bathroom] was missing and a pane of window glass was on the lawn in front of the window"; "below the window was a pile of flagstone and pieces of lumber"; and on the second floor of defendant's home he found two bullet holes in the wall and discovered pictures and broken wooden picture frames on the floor. Moran also identified a police photograph that showed a bed pillow that was lying across the victim's legs that had two bullet holes in it and powder burns and another photograph of a pillow with blood on it that was underneath the victim.

Detective Harry Collins testified that he arrived at

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defendant's home around 5 or 5:15 a.m. to conduct a search of defendant's bedroom. Collins did not have a warrant to search the furniture, but he found a video cassette box that fell out of the inside of a television cabinet when he bumped into it with his foot. Inside the box was a single-shot derringer pistol, some expended shell casings and a hypodermic needle. Collins also saw a glass window pane which had been removed from the first floor bathroom lying on the lawn and that putty had been removed from around the window.

Detective Richard Schak testified that he learned at approximately 8:30 a.m. on September 28, 1995, that a small derringer pistol had been found in a movie video case in the bedroom where Leslie O'Farrell was shot. Detective Schak asked defendant at the Area Five police headquarters if he owned a gun or if there would be any reason for a gun to be in his home. Defendant told Schak that "there wouldn't be any reason for a gun to be there, and he didn't own a gun." Schak then gave defendant Miranda warnings. According to Schak, after he told defendant that a gun was found in the bedroom in a closed video case, defendant responded, "You're right," and further stated "I did it. I killed her, but she wanted me to. I did it for her." Defendant explained to Schak that his wife had been sick and she had diabetes, was beginning to experience kidney failure, was diagnosed with Bell's Palsy and was concerned about being disfigured. Defendant also stated that six months earlier his wife had tried to kill herself

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with an insulin overdose. Defendant also told Schak that his wife pleaded with him to help her take her own life, she asked him to shoot her, she "came up" with the weapon, they made a plan, and he did "take her life for her."

Defendant further told Schak that on the day of the shooting, he went home after work and his wife talked to him about taking her life. Defendant also stated that his wife had taken the glass out of the bathroom window and removed the glass so it would look like somebody came into the house through the bathroom. Defendant further stated that his wife asked him to take her life after she went to sleep. Defendant waited after she fell asleep and she woke up several times and continued to ask him why he did not take her life. After 4 a.m., defendant decided to go ahead and "continue the plan" and fired a shot into his wife's skull through a pillow while she was lying in bed. Defendant then shot his wife in her chest because she was quivering and moving around and he thought she might be in some pain. Thereafter, he fired a shot in the hall, then shot himself in the shoulder and put the gun in the video case. Defendant then called 911.

Assistant State's Attorney Tom Kougas testified that he met Detective Schak at Area Five police headquarters, had a conversation with him, reviewed the police reports that were available, and questioned defendant. Detective Schak was present while Kougas asked defendant questions. Kougas stated that he gave defendant Miranda warnings and interviewed defendant from

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approximately 11:30 a.m. until 2 p.m. on September 28, 1995. Kougias' testimony was identical to Schak's regarding defendant's wife's illnesses and defendant's version of the events that occurred on the night defendant's wife was shot. Kougias further testified that the "story" defendant and his wife decided on was to make the bathroom window look like "a point of entry" for a "six-foot-three-inch African-American male black" to break in the house, shoot defendant's wife and then flee. Kougias also stated that defendant told him that he went about the house throwing pictures on the floor to make it look like a struggle had occurred and pushed the screen door out beyond its limit so that it would break and it would be more believable that the offender escaped through the screen door.

The trial court subsequently found defendant guilty of two counts of first degree murder, and merged count two into count one. At defendant's sentencing hearing, in aggravation the State called Thomas Dye, a police informant, who testified that in November and December 1995 he was in the Cook County jail with defendant. While there, defendant told him that he had killed his wife and "there was insurance money involved." Defendant further told Dye that being with his wife was a good thing to do financially because her family had money; his parents and his wife's family were involved in a custody battle concerning his son; he did not "know how to handle it as far as keeping the insurance money tied into his side of the family"; he had preplanned to kill his wife; and he did not



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like his wife, but stayed with her to "solidify the insurance money" that was coming from her grandparents. Dye also stated that defendant told him "[defendant's] son would inherit the money and [defendant] would control the inheritance based on his son being a minor."

Dye further testified that defendant told him that on the night of the shooting he got drunk at a bar and went back to his house, put a pillow over his wife's head and shot her. Dye also stated that defendant told him that if he was convicted of second degree murder "it would be okay because he would be out of jail before his son turned 18." Defendant further told Dye that he "hoped" to be found guilty of second degree murder because his father was a police officer, his wife was sick and he would tell the court it was a mercy killing, he did not have a record, and he was "clean-cut."

In mitigation, Dr. Larry Heinrich, a licensed clinical psychologist and board certified forensic examiner in psychology, testified in behalf of defendant that he examined defendant in May 1996 to evaluate him for fitness and sanity. According to Dr. Heinrich, defendant suffered from chronic depression and was experiencing a depressive disorder when he was in therapy during his marriage in 1992. Based on defendant's and his wife's therapy records, defendant's depressive disorder was related to family and personal issues such as financial conditions, his wife's health and the raising of his son. Heinrich also stated that defendant's wife

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talked about passive suicidal ideation and wishes in her therapy session, and wrote in her personal diary notes about despondencies, hopelessness, helplessness and a feeling of a sense of worthlessness and being useless as a woman. Heinrich further stated that at one time defendant and his wife considered separation and divorce.

Gerald Phillips, defendant's adopted brother, testified that as a child, defendant had asked his parents to take Phillips into their home and raise him after Phillips' parents had died and he was having problems with his new family. Phillips was eventually adopted by defendant's parents when he was 14 years old. John Kohn, defendant's brother-in-law testified that defendant came to his rescue after he was involved in a traffic altercation and was attacked and stabbed. Defendant also submitted 30 letters from his friends and family in his behalf that described defendant as a kind and compassionate person.

In closing argument, the State argued that defendant's act merited that defendant be sentenced to 60 years' imprisonment because defendant's murder of his wife was "pure sickness" based on defendant's acts in removing the bathroom window, throwing pictures down from off the wall to make the murder look like a struggle occurred, implicating a black person, and defendant's shooting of himself so that the police would believe he had been assaulted.

Defendant's counsel urged the trial court to impose the minimum sentence of 20 years' imprisonment based upon Dr.

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Heinrich's testimony; Dye's lack of credibility; defendant's participation in 20 sessions of marital counseling; the lack of evidence of any battery by defendant against his wife; defendant's lack of criminal history; and testimony that defendant had been a loving member of his family, helping out those in need and he was a good father.

Defendant testified that he was "very sorry for all the pain and suffering" he had caused everyone. Defendant further stated that he signed a prenuptial agreement and he would not receive financial gain from his wife's death. Defendant also asked the trial court to "please make a reasonable sentence [so] that [he] may one day return back to this society and try to make up to [his] son for the loss of his mother."

The trial court subsequently sentenced defendant to 50 years' imprisonment. Defendant filed a motion for new trial and a motion to reconsider his sentence, which the trial court denied. This appeal followed.

Defendant first contends that the trial court abused its discretion in sentencing him to 50 years' imprisonment, arguing that the sentence is excessive because he had no prior criminal history, had strong family and community support, the circumstances of his case were unique and unlikely to recur, and he had a "great amount of rehabilitative potential." Defendant also argues that Dye's testimony was "self-serving" and "completely untrustworthy and should be given no credence by this Court in assessing whether

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[his] sentence was excessive." The State argues that the trial court's sentence was not an abuse of discretion based on the fact that defendant shot and killed his wife because "he no longer wanted to be married to her and wanted to gain control over a large inheritance which she had received."

"The standard of review of a sentence claimed to be excessive is whether \*\*\* the trial court exercised discretion and, if so, whether this discretion was abused." People v. Cox, 82 Ill. 2d 268, 275, 412 N.E.2d 541 (1980). A reviewing court is empowered to reduce the punishment that has been imposed by the trial court. 134 Ill. 2d R. 615(b)(4). The trial court's judgment with regard to the appropriate punishment is entitled to great deference. People v. Illgen, 145 Ill. 2d 353, 379, 583 N.E.2d 515 (1991), citing People v. Godinez, 91 Ill. 2d 47, 55, 434 N.E.2d 1121 (1982). "[A] reviewing court will not substitute its judgment for that of a sentencing court merely because it would have weighed the factors differently." People v. Pittman, 93 Ill. 2d 169, 178, 442 N.E.2d 836 (1982), citing People v. Perruquet, 68 Ill. 2d 149, 368 N.E.2d 882 (1977). The trial court is in the best position to determine an appropriate sentence because of its ability to hear evidence and view witnesses. People v. Jones, 236 Ill. App. 3d 244, 251, 603 N.E.2d 619 (1992).

At the time of defendant's murder of his wife, the Unified Code of Corrections (Code) provided a sentence of imprisonment for first degree murder of not less than 20 years and not more than 60

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years. 730 ILCS 5/5--8--1 (a)(1)(a) (West 1996). Section 5--4--1(c) of the Code provides that, "[i]n imposing a sentence for a violent crime \*\*\* the trial judge shall specify on the record the particular evidence, information, factors in mitigation and aggravation or other reasons that led to his sentencing determination." 730 ILCS 5/5--4--1(c) (West 1996). "The nature of the crime, protection of the public, deterrence, and punishment all have equal status in the determination" in setting an appropriate sentence. People v. Smith, 246 Ill. App. 3d 647, 653, 616 N.E. 2d 737 (1993). It is also well settled that a trial court is not required to make an express finding that a defendant lacks rehabilitative potential nor accord greater weight to a defendant's potential for rehabilitation than to the seriousness of the offense. People v. Bocclair, 225 Ill. App. 3d 331, 335-36, 587 N.E.2d 1221 (1992). A sentence within the statutory limitations will not be disturbed on review unless it is grossly disproportionate to the nature of the offense. People v. Moore, 178 Ill. App. 3d 531, 542, 533 N.E.2d 463 (1988).

The trial court's statements at defendant's sentencing hearing here clearly indicate that the court considered all factors in aggravation and mitigation. In imposing sentence, the trial court stated that the factors of aggravation "loom high." The court also stated:

"[What the facts] reveal is a sad and sorted  
[sic] tale, cold-blooded and rather ruthless

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killing of a wife as she laid rather helpless in her bed. No struggle indicated, a plan purportedly devised by Lesley, so the defendant says, and acted upon by himself, and thereafter inflicted a not so grievous wound upon himself, and engaged in further deception to mask his own culpability."

The court also stated,

"We have a factor of deterrence both for \*\*\* [defendant] that he must, by his own acts and conduct, be removed from society for a number of years to come, and the factor of deterrence, as in all cases, for others who may be similarly situated or inclined to emulate \*\*\* [defendant's] behavior here."

The court summarized the mitigating factors as follows,

"It is true in mitigation that \*\*\* [defendant] has no prior history of criminal convictions, which the Court has and is duty bound to consider. He has obviously had the benefit of a good upbringing, parents who have been faithful to him, supportive, even up to this day, and, no doubt, will continue to be, numerous friends and family who have made submissions on his behalf today, somebody with

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a fairly enviable background when I look at Mr. O'Farrell in contrast to many others who walk in and out of this courtroom. He is a high school graduate, three years of college, enjoyed fairly regular employment, at least for the three years preceding this event, had a family, has a young son, who, unfortunately, must suffer the loss of, not only his mother, but now his father as well."

The court further noted that while it felt defendant was "truly remorseful for [the] inevitable result," defendant had overlooked the fact that it was because of the life that was taken by his hand that his son will lose the benefit of both parents. The trial court also stated that a factor it would consider, as defense counsel pointed out, was that "this is a truth-in-sentencing case."

We conclude that the trial court's remarks reveal that it carefully considered both mitigating and aggravating factors in sentencing defendant. The trial court was in the best position to determine an appropriate sentence because of its ability to hear evidence, view witnesses and weigh the factors in aggravation and mitigation in sentencing defendant. We will not substitute our judgment for that of the trial court. Additionally, defendant's 50-year sentence was within the statutory range of 20 to 60 years for the offense of first degree murder. 730 ILCS 5/5--8--1 (a)(1)(a)(West 1996). Accordingly, we find that the trial court

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did not abuse its discretion in sentencing defendant to 50 years' imprisonment.

We briefly note that defendant's reliance on People v. Hammerli, 277 Ill. App. 3d 873, 662 N.E.2d 452 (1996), and People v. Crow, 168 Ill. App. 3d 744, 521 N.E.2d 594 (1988), in support of his excessive argument, is misplaced. Defendant relies on Hammerli and Crowe for the proposition that because the defendants in those cases were convicted of murdering an ex-spouse and spouse, respectively, and received a sentence of 35 years' imprisonment, lower than his 50-year sentence, his sentence is excessive. Defendant's "argument" consists merely of making a comparison between the nature of the acts of the defendants in committing the murders in Hammerli and Crowe, which were found to be methodical and logical (Hammerli, 277 Ill. App. 3d at 882) and deliberate, planned, "coldblooded and brutal" (Crowe, 168 Ill. App. 3d at 756), and his own murder of his wife, which he asserts was "hardly cold and calculated, but was instead the result of stress and depression." However, like the Crowe court, in responding to the Crowe defendant's argument that she was suffering an "'emotional upheaval' [when she murdered her husband] and that deterrence is of little effect in such a situation," we similarly respond to defendant's argument by pointing out that defendant here "was convicted of murder, not voluntary manslaughter." Crowe, 168 Ill. App. 3d at 757. Moreover, the trial court's judgment with regard to the appropriate punishment is entitled to great deference and,



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as discussed above, the trial court fully considered all mitigating and aggravating factors and we find no reason to substitute our judgment for that of the trial court.

Defendant also argues that this court should not give "credence" to Dye's testimony in assessing whether his sentence was excessive. A trial court's determination as to the credibility of witnesses and the weight to be given their testimony is entitled to great deference. People v. Jones, 174 Ill. App. 3d 737, 745, 528 N.E.2d 1363 (1988). The trial court was in the best position to assess Dye's credibility based on his testimony and in viewing him, and we will not reweigh the evidence. We further find that defendant has waived review of his argument that we should compare his sentence to the average sentence imposed for first degree murder according to the "Statistical Presentation of the Illinois Department of Corrections." Defendant has raised this issue for the first time in his reply brief; defendant did not raise it as his sentencing hearing nor did he raise it in his motion to reconsider his sentence. People v. Enoch, 122 Ill. 2d 176, 186, 522 N.E.2d 1124 (1988).

Defendant next argues that "[t]his Court should issue an order stating that \*\*\* [he] will not be subject to the truth-in-sentencing law," enacted by Public Act 89-404, because it "violated the single subject rule of the Illinois Constitution, Article IV, Section 8(d)." The State argues that Public Act 89-404 was passed in compliance with the single subject rule because it was limited

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to the single subject of governmental relations. The State also argues that if Public Act 89-404 was originally passed in violation of the single subject rule, any defect has been cured by its subsequent codification. The State contends that it is irrelevant that defendant was sentenced after the codification because he could have filed a timely action for a declaratory judgment that Public Act 89-404 was passed in violation of the constitution's single subject requirement.

Section 3--6--3(a)(2)(i) was enacted on August 20, 1995, as part of Public Act 89-404, and provides "that a prisoner who is serving a term of imprisonment for first degree murder shall receive no good conduct credit and shall serve the entire sentence imposed by the court." 730 ILCS 5/3--6--3(a)(2)(i) (West 1996). Defendant was convicted of an offense that occurred on September 28, 1995, and because his offense occurred after August 20, 1995, the truth-in-sentencing provision would be applicable to him. However, our supreme court has recently held that Public Act 89-404 violated the single subject rule. People v. Reedy, Nos. 85191, 85297 (Cons.) (January 22, 1999). The Reedy court also declined to accept the codification argument asserted by the State that a defendant is precluded from challenging the constitutionality of an act on single subject grounds once the act has become codified. Reedy, slip op. at 8-9. We therefore hold that defendant is entitled to be sentenced in accordance with the statute in effect prior to Public Act 89-404, and is eligible to receive "one day of

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good conduct credit for each day of service in prison." 730 ILCS 5/3--6--3 (West 1994).

Lastly, defendant contends the mittimus should be amended to reflect that he was convicted and sentenced for only one count of first degree murder; defendant argues that the mittimus incorrectly shows that he was convicted of two counts of murder. The State argues this is a "non-issue" because the trial court expressly stated that it was merging count two of the indictment into count one; *i.e.*, the court clearly wrote upon the mittimus, "Count Two to Merge."

This court is empowered to "reverse, affirm, or modify the judgment or order" from which an appeal is taken. 134 Ill. 2d R. 615(b)(1)(1990). A reviewing court has a duty to resolve contradictions which exist between the common law record and the report of proceedings by looking at the record as a whole. People v. Stingley, 277 Ill. App. 3d 239, 242, 660 N.E.2d 67 (1995), citing People v. Fike, 117 Ill. 2d 49, 56, 509 N.E.2d 1011 (1987). Where there is only one victim, there can be only one conviction for murder. People v. Burnett, 267 Ill. App. 3d 11, 17, 640 N.E.2d 1350 (1994). It is the oral pronouncement of the judge which is the judgment of the court; the written order of commitment is merely evidence of the judgment of the court. People v. Smith, 242 Ill. App. 3d 399, 402, 609 N.E.2d 1004 (1993), citing People v. Williams, 97 Ill. 2d 252, 310, 454 N.E.2d 220 (1983). "Where looking at the record as a whole, if the written order is not

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inconsistent with the intent, sense and meaning of the circuit court's oral pronouncement, the written order will be enforced." Smith, 242 Ill. App. 3d at 402.

In the present case, defendant was indicted on two counts of first degree murder, in violation of "Chapter 720, Act 5, Section 9--1--A(1) of the Illinois Compiled Statutes" (count one) and "Chapter 720, Act 5, Section 9--1--A(2)" (count two). At defendant's bench trial, the court stated:

"All in all, based upon the totality of the circumstances here, the Court finds that the State has overwhelmingly I would say proved the allegations contained in the indictment and more particularly the allegations in Count 1, which are predicated upon the theory of express malice or intentional murder. The Court will enter a finding of guilty as to Count 1. Count 2, while there is sufficient evidence to sustain it, it will merge into the finding as to Count 1. And that will be the findings entered today."

The mittimus lists both counts from the indictment and clearly states, "Count Two to Merge." Given the fact that the written order is consistent with what the trial court orally pronounced, we find that the mittimus need not be amended.

For the reasons stated, the judgment of the circuit court is

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affirmed, and we modify the mittimus to reflect defendant's entitlement to receive one day of good conduct credit for each day of service in prison. See e.g., People v. Percy Jones, No. 1--97--3747 (December 31, 1998); People v. Reedy, 295 Ill. App. 3d 34, 44, 692 N.E.2d 376 (1998).

Affirmed, as modified.

BURKE, J., with CERDA and McBRIDE, JJ., concurring.

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J. McBride replaced J. Leavitt as a panel member in the decision of this appeal, and she reviewed the record, briefs, and tape of the oral argument.





ORIGINAL

88481

NO.

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,  
~~Plaintiff-Appellee,~~  
*Respondent*

v.

) PETITION FOR LEAVE TO  
 ) APPEAL FROM THE APPELLATE  
 ) COURT OF ILLINOIS, FIRST  
 ) JUDICIAL DISTRICT  
 ) NO. 97-0911

) THERE HEARD ON APPEAL  
 ) FROM THE CIRCUIT COURT  
 ) OF COOK COUNTY, ILLINOIS  
 ) NO. 95 CR 30463

THOMAS O'FARRELL, *Petitioner*  
~~Defendant-Appellant, Pro-Se,~~

) Honorable Michael P. Toomin  
 ) Judge Presiding

PETITION FOR LEAVE TO APPEAL

THOMAS O'FARRELL  
 Defendant-Appellant, Pro-Se  
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 P.O. Box 515  
 Joliet, Illinois 60432  
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ORAL ARGUMENT REQUESTED

FILED

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NO.  
IN THE SUPREME COURT OF THE STATE OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	PETITIONE FOR LEAVE TO APPEAL FROM THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT NO. 97-0911
v.	)	THERE HEARD ON APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS NO. 95 CR 30463
THOMAS O'FARRELL, Defendant-Appellant, Pro-Se,	)	Honorable Michael P. Toomin Judge Presiding

PETITION FOR LEAVE TO APPEAL

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE  
STATE OF ILLINOIS:

May it please the Honorable Court:

I.

PRAYER FOR LEAVE TO APPEAL

Your Petitioner, thomas O'Farrell, Pro-Se, respectfully petitions this Honorable Court for Leave To Appeal pursuant to Supreme Court Rule 315. from the judgement of the Appellate Court of Illinois, First Judicial district, which affirmed the judgement of conviction and modified sentence entered by the Circuit Court of Cook County, Illinois upon the verdict finding Petitioner guilty to Two Counts of First Degree Murder.



II.

OPINION AND PROCEEDINGS BELOW

On January 21, 1997, Petitioner was found guilty of Two Counts of First Degree Murder. Petitioner was subsequently sentenced to a (50) Fifty year prison term upon his conviction. Petitioner appealed this conviction to the Illinois Appellate Court, First Judicial District. On March 24, 1999 the Appellate Court delivered its opinion in said appeal, affirming the judgement of conviction and modified the sentence. Petitioner filed a petition for rehearing on May 26, 1999, but the Appellate Court subsequently denied said petition on September 8, 1999. Petitioner filed an affidavit of intent to file a petition for leave to appeal to the Illinois Supreme Court with the Supreme Court of Illinois and the Appellate Court of Illinois, First Judicial District on September 25, 1999.

## IV.

STATEMENT OF FACTS

Defendant, Thomas O'Farrell, was charged by the State, by indictment for the offense, two counts of First Degree Murder in connection with the shooting death of his wife, Lesley Chapman-O'Farrell. (said victim) Defendant waived his right to a trial by jury, and this cause proceeded to a bench trial. Trial Court subsequently sentenced Defendant to a (50) fifty year prison term upon his conviction of this offense.

The State's case showed that Defendant's wife on the morning of September 28, 1995 was shot twice in her home and died from said gunshot wounds.

Eleanor Zagone testified that she was friends with the victim and Defendant for many years. (R.112-13) Ms. Zagone received a telephone call at approximately 4:15 a.m. on the morning of September 28, 1995 from the Defendant. (R.114-15) Ms. Zagone heard Defendant yell in an excited tone of voice: "Ellie, Ellie, Ellie." (R.115) Defendant then told Ms. Zagone that: "Someone came in the house and shot Lesley." (R.116) Ms. Zagone told Defendant: "Tom, calm down and call the police." (R.116) Defendant then told Ms. Zagone he had called the police, but needed her to come to the home and get the victim and Defendant's son, LeRoi. (R.116) Ms. Zagone told Defendant: "Why don't you call Abby because she is closer." (R.116) Ms. Zagone knew the victim suffered from eye and kidney problems due to complications caused by her diabetes. (R.117-18)

Chicago Police Officer Veronica Pettry testified that at

## III.

POINTS RELIED UPON FOR REVERSAL

THE FIFTY YEAR SENTENCE IMPOSED UPON THOMAS O'FARRELL  
 WAS GROSSLY DISPROPORTIONATE, EXCESSIVE AND AN ABUSE  
 OF DISCRETION IN LIGHT OF THE ACTUAL OFFENSE, DEFENDANT'S  
 LACK OF PRIOR CRIMINAL ACTIVITY, HIS STRONG FAMILY AND  
 COMMUNITY SUPPORT, THE UNUSUAL CIRCUMSTANCES LEADING  
 UP TO THE OFFENSE WHICH ARE UNLIKELY TO RECUR, AND  
 OVERWHELMING EVIDENCE THAT HE HAS EXCELLENT REHABILITATIVE  
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## IV.

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The State's case showed that Defendant's wife on the morning of September 28, 1995 was shot twice in her home and died from said gunshot wounds.

Eleanor Zagone testified that she was friends with the victim and Defendant for many years. (R.I12-13) Ms. Zagone received a telephone call at approximately 4:15 a.m. on the morning of September 28, 1995 from the Defendant. (R.I14-15) Ms. Zagone heard Defendant yell in an excited tone of voice: "Ellie, Ellie, Ellie." (R.I15) Defendant then told Ms. Zagone that: "Someone came in the house and shot Lesley." (R.I16) Ms. Zagone told Defendant: "Tom, calm down and call the police." (R.I16) Defendant then told Ms. Zagone he had called the police, but needed her to come to the home and get the victim and Defendant's son, LeRoi. (R.I16) Ms. Zagone told Defendant: "Why don't you call Abby because she is closer." (R.I16) Ms. Zagone knew the victim suffered from eye and kidney problems due to complications caused by her diabetes. (R.I17-18)

Chicago Police Officer Veronica Pettry testified that at

approximately 4:20 a.m. on the morning of September 28, 1995, she and her partner, Chicago Police Officer Pete Maderer were dispatched to the victim and Defendant's home, located at 3435 West Ardmore, Chicago, Illinois. (R.I20-21) Upon arriving at the victim and Defendant's home, the front door was open and Defendant and his son were sitting on the base of the stairs. (R.I22) According to Officer Pettry, while she was walking up to the front door, Defendant allegedly said: "Get the hell in here." (R.I24) Defendant told Officer Pettry that his wife had been shot by an intruder in the upstairs bedroom. (R.I26) Defendant was awakened by the sound of a gunshot and saw a black male intruder in the bedroom. (R.I28) Defendant began struggling with the intruder, the struggle took them into the hallway, at which time the gun went off, Defendant thought that the intruder had been shot in the stomach. (R.I28)

Chicago Police Officer Ronald Cooper testified that he was assigned to go with Defendant and the paramedics to the hospital. (R.I46-48) Defendant told Officer Cooper that he was awakened by gunshots and saw a black male intruder standing over his wife, that he and the intruder struggled, that the intruder was shot in the stomach and that he was shot in the shoulder during the struggle. (R.I50)

Chicago Police Detective William Kernan testified that he interviewed Defendant at Illinois Masonic Hospital. (R.I58) Defendant told Detective Kernan that on the previous night he had left work at approximately 10:30 p.m., stopped at the bar for a few beers, left the bar at approximately 11:30 p.m., and

arriving home a little after midnight. (R.I61) Defendant spoke with his wife, who was still awake, then went to sleep. (R.I61-62) Defendant was awakened by: "Two loud pops, which he believed to be gunfire or firecrackers." (R.I62) Defendant looked over and observed a black male intruder standing over his wife, struggled with the intruder, and both the intruder and Defendant were shot during the struggle. (R.I62-63) Defendant fell over his rottweiler, at which time the intruder ran down the stairs and out of the rear door of the house. (R.I63)

Chicago Police Officer, Evidence Technician Patrick Moran testified that he opened the vhs video cassette tape box exposing the contents, (R.I114-115) which contradicts Detective Harry Collins testimonies.

Chicago Police Detective Harry Collins testified that he arrived at the victim and Defendant's home (the scene) at approximately 6:00-6:30 a.m. on the morning of September 28, 1995. (R.I123) Detective Collins then conducted a search of the victim and Defendant's home, where while looking behind a t.v. stand, his foot bumped the bottom of said t.v. stand, causing the door to swing open and a vhs video cassette tape box fall out to his feet, opening exposing a derringer pistol, some shell casings and a hypodermic needle, (R.I119-120) which contradicts his previous testimony in the suppression hearing of the motion to suppress evidence, that he had opened the vhs video cassette tape box after it fell out to his feet. (R.I132)

Evidence Technician Robert Berk testified that he examined samples from Defendant's hands and determined the left hand of Defendant had been in the environment of gunshot residue by either handling, firing or being in the close proximity to the weapon when it was discharged. (R.1140) On cross examination, Mr. Berk admitted that the presence of residue on Defendant's left hand could be consistent with being in a struggle over a weapon. (R.1141)

Chicago Police Detective Richard Schak testified Defendant was present at Area Five Headquarters at approximately 8:30-9:00 a.m. on the morning of September 28, 1995, when he learned that a small derringer was found in a video cassette case at the victim and Defendant's home. (R.1144) Detective Schak then asked Defendant if he owned a gun or if there would be any reason for a gun to be in his home. (R.1146) After Defendant said he did not own a gun or there would be no reason for a gun to be in his home, Detective Schak gave Defendant miranda warnings and informed Defendant that he was no longer a victim in this case, no longer a witness, and in his eyes Defendant was now a suspect. (R.1146) Defendant said he understood his rights and since he had nothing to hide would "gladly" talk with the detective. (R.1147) According to Detective Schak, Defendant then stated that: "I did it. I killed her, but she wanted me to. I did it for her." (R.1148) Detective Schak then stated: "That doesn't make any sense, but why don't you explain it." (R.1148-149) According to Defendant, his wife had been sick and had

diabetes and was experiencing kidney failure and diagnosed with bell's palsy, and his wife had tried to commit suicide six months earlier by taking an overdose of her insulin.

(R.I149) The victim obtained a weapon and together they devised a plan after the victim plead with Defendant to take her life. (R.I149) Defendant told Detective Schak that on

September 27, 1995, Defendant got off work at approximately 11:30 p.m., stopped at the bar for a few drinks, and then went home. (R.I150) Defendant believed his wife would be sleeping

upon his arrival home, but she was still awake. (R.I150) She talked to Defendant about taking her life and would he do what

she asked him to do, at which time they talked for awhile, and Defendant decided to do it. (R.I150) Defendant's wife told

Defendant that she had already took steps to make it look like a break-in, that she had removed the glass from the bathroom

window so it would look like someone came into the house through the bathroom, and then asked Defendant after she went

to sleep, would he take her life. (R.I150) Defendant's wife went to sleep, Defendant sat there and thought about it.

(R.I150) Defendant's wife woke up several times and questioned Defendant, why he did not take her life and why he

would not do it. (R.I150) Finally, Defendant agreed to do it,

and told her he would do it. (R.I150) At approximately 4:00 a.m., Defendant's wife went back to sleep, at which time

Defendant continued with the plan and shot his wife through a pillow in the head. (R.I150-151) At this point Defendant's

wife began to quiver and move round, Defendant thought she was



in pain, so Defendant then shot his wife in the chest at which point she stopped moving. (R.1151) Defendant then stood there for a few minutes looking at his wife and thinking about what he had just done. (R.1151) Defendant then went into the hallway and shot into the wall. (R.1151) Although Defendant agreed that he would not hurt himself to his wife, Defendant thought it would look more believable if he was hurt in the struggle, so Defendant fired a shot into the meaty part of his shoulder, put the gun into the vhs video cassette case, called 911 twice, a friend of the victim and Defendant's, his father, and then took his son from his room and went downstairs, opened the front door and waited for the police to arrive. (R.1152)

A stipulation was entered that Dr. Nancy Jones would testify if called that she performed the autopsy on Lesley Chapman-O'Farrell and that she died as a result of multiple gunshot wounds, and the manner of death was ruled a homicide. (R.1158-159)

Chicago Police Firearms Expert Richard Chenow testified that he examined two bullets taken from the body of Lesley Chapman-O'Farrell during the autopsy and compared these bullets to rounds test-fired from the gun found in the vhs video cassette box. (R.1163-170) According to Mr. Chenow, one of the bullets recovered from the body had class characteristics consistent with the test-fired bullets. (R.1170-171) However, there were no individual characteristics which could positively show that the bullet

recovered from the body had been fired from the gun found in the vhs video cassette box. (R.I172) MR. Chenow also testified that the derringer found in the vhs video cassette box was a single shot gun, which had to be reloaded each time it was fired. (R.I173-174) Mr. Chenow further testified that without the striations or individual characteristics on the bullets recovered from the victims body, he could not give a positive opinion. (R.I175)

After the People rested, Thomas O'Farrell, Defendant's father testified that Defendant was right-handed. (R.I198) Defendant subsequently rested. (R.I198)

Following closing arguments, the Trial Court found Defendant guilty of first degree murder and merged the second count into the first count. (R.I209-210) On February 24, 1997, the Trial Court sentenced Defendant to 50 years imprisonment. (R.K87) Trial Court denied Defendant's motion to reconsider sentence on the same date. (R.K88) Defendant file a timely notice of appeal. (R.C.97)

In February 1998, Defendant filed an appeal with the Appellate Court arguing that his sentence was excessive, an abuse of discretion of the Trial Court, Truth-in-sentencing, Public Act 89-404 violated the single subject rule of Article IV, Section 8 of the Illinois Constitution and that the sentencing order should be amended to reflect that Defendant was convicted and sentenced for only one count of first degree murder. (R.Def. Br. 1-11)

On March 24, 1999, the Appellate Court ordered

Defendant's conviction affirmed, modified the sentence due to the single subject violation of the Illinois Constitution, Article IV, Section 8 and denied the amendment of the sentencing order. (R.App. Court order)

Defendant filed a petition for rehearing with the Appellate Court on May 26, 1999, which was denied on September 8, 1999. (R. Def. Pet. for rehearing)

V.

ARGUMENT

THE FIFTY YEAR SENTENCE IMPOSED UPON THOMAS O'FARRELL WAS GROSSLY DISPROPORTIONATE, EXCESSIVE AND AN ABUSE OF DISCRETION IN LIGHT OF THE ACTUAL OFFENSE, DEFENDANT'S LACK OF PRIOR CRIMINAL ACTIVITY, HIS STRONG FAMILY AND COMMUNITY SUPPORT, THE UNUSUAL CIRCUMSTANCES LEADING UP TO THE OFFENSE WHICH ARE UNLIKELY TO RECUR, AND OVERWHELMING EVIDENCE THAT HE HAS EXCELLENT REHABILITATIVE POTENTIAL.

Thomas O'Farrell was convicted of the offense of first degree murder, which has a sentencing range of 20 to 60 years imprisonment. 730 I.L.C.S. 5/5-8-1(a)(1)(a) (1995). Under the unusual circumstances of the case at bar, where the evidence showed this offense was actually a "mercy killing" and defendant had no prior history of criminal activity, had strong family and community support, and where the unusual circumstances leading up to the offense are unlikely to recur, the sentence of 50 years imprisonment (more than twice the minimum sentence) was grossly disproportionate and excessive to the actual offense. Accordingly, this Honorable Court should reduce his sentence.

The standard of review of a sentence claimed to be excessive is whether the trial court exercised discretion and, if so, whether the trial court abused its discretion. People v. Cox, 82 Ill.2d 268, 275, 412 N.E.2d 541 (1980). Generally a reviewing court will not reduce a sentence on appeal. Nevertheless,

there are instances which call for a reviewing court to reduce a sentence even when the sentence is within the statutory limits. People v. Gibbs, 49 Ill. App.3d 644, 648, 364 N.E.2d 491 (1st Dist. 1977). A reviewing court is empowered to reduce a excessive sentence that has been imposed by the trial court under Supreme Court Rule 615(b)(4). A sentence falling within statutory limits is usually not overturned unless it is grossly disproportionate to the nature of the actual offense. People v. Phillips, 265 Ill. App.3d 438, 449, 637 N.E.2d 715 (1st Dist. 1994). Moreover, the Illinois Constitution requires that the sentence reflect defendant's rehabilitative potential as well as the seriousness of the actual offense. (Ill. Const. 1970, art. I sec. 11).

The evidence adduced at trial and at sentencing shows that the 30 year sentence imposed upon defendant was an abuse of discretion. At the time of the offense defendant was 31 years old and had absolutely no history of prior criminal activity. (R.K-85;C.79) Moreover, the unusual circumstances of the actual offense show that it arose from a unique situation which is very unlikely to recur, since the actual offense was a "mercy killing" and a result of defendant's severe emotional and mental disturbance, namely depression and conflict which resulted from his wife's (the victim) serious illnesses.

Defendant's confession established the following facts. Defendant believed that the victim was terminally ill. (R.1182) The victim had been sick, had diabetes, experienced kidney failure, was recently diagnosed with bell's palsy which caused

the victim to become concerned with her disfigurement, and that the victim approximately six months earlier attempted to take her own life by overdosing on her insulin. (R.1149) The victim continuously plead with defendant to help her take her life. (R.1149) Defendant argued with the victim in the past, because defendant did not want to assist her in taking her life. (R.1182) On the night prior to the offense, defendant left work, went for a few beers and went home a little after midnight. (R.1161) Defendant believed that his wife would be sleeping upon his arrival home, but she was still awake. (R.1150) Upon defendant's arrival home, the victim handed him a gun. (R.1182) The gun was a single shot derringer that had to be reloaded after each shot. (R.1169;173) Then the victim asked defendant to help her take her life. (R.1150) The victim eventually talked defendant into helping her take her life and told defendant that she had already took steps to make it look like someone broke into the home and killed her. (R.1150) Then the victim went to sleep, at which point defendant sat and thought about what she had asked of him. (R.1150) The victim woke up several time between 1:00 a.m. and 4:00 a.m., at which point she continued to ask defendant why he had not yet took her life, at which time defendant agreed to do it, and told her he would. (R.1150) Approximately 4:00 a.m. on the morning of the offense, defendant's wife went back to sleep, at which time defendant continued with his wives plan and shot through a pillow into her head. (R.1150-151) Defendant's wife began to quiver and move around, defendant

thought she was in pain, so defendant reloaded the gun and shot his wife in the chest, at which point she stopped moving. (R.1151) Defendant after standing there for a few minutes looking at his wife and thinking about what he had just done, went into the hallway and shot into the wall and then shot himself in his shoulder, put the gun into a vhs video cassette case, and then called 911 twice, a friend and his father. (R.1151-152)

Defendant then told the police about waking up to the sound of gunshots, fighting off a six-foot-three, 200-pound black male intruder where he was shot in the shoulder, watched the intruder flee and discovered that his wife was dead. (R.125-29;149-52; and 162-64) However, when defendant was interrogated by detective Schak and confronted with evidence linking him to the offense, defendant told detective Schak and A.S.A. Kougiyas the truth about the offense actually being a "mercy killing". (R.1148-152;1182-186)

State's witness Eleanor Zagone who was friends with the victim and defendant verified that the victim suffered from eye and kidney problems due to complications caused by her diabetes. (R.117-18)

The State relies extensively upon the testimony of State's witness Thomas Dye to support an offense of a cold, calculated and premeditated murder. It was Dye alone who testified that defendant realized the victim's family had money early in their relationship. (R.K15-16) Defendant did not have an affectionate or love feeling for the victim, but thought dating

her would be a good thing to do financially. (R.K16) Defendant stayed with the victim longer than he wanted to so he could solidify the insurance money due to be inherited by her from her grandparents. (R.K15) Defendant was unhappy, didn't want to be married to the victim, their relationship deteriorated and he decided to kill her. (R.K18)

Dye testified for the State at O'Farrell's sentencing hearing in exchange for an agreement where he would receive four years imprisonment on three separate convictions for theft. (R.K9) At the time of his testimony, Dye had a total of 14 prior felony convictions and had been imprisoned three separate times. (R.K21;28) Dye was a drug dealer for a period of time and admitted that he used many aliases in his life. (R.K23-24) Dye testified against another inmate in a prior case and obtained a deal whereby the prosecution agreed to cut his 14 year sentence in half and have three other felony convictions run concurrent with his already reduced sentence. (R.K21-22) Dye admitted that he was assigned to the protective custody unit where defendant was housed because he was widely known as a "jailhouse snitch". (R.K26)

Moreover, Dye's testimony is inconsistent with the testimony of Dr. Larry Heinrich, a Licensed Clinical Psychologist and a Board-certified Forensic Examiner in Psychology who testified at O'Farrell's sentencing hearing. Dr. Heinrich examined defendant twice and reviewed the reports of Dr. Kenneth Robbins, the marriage therapist of the victim and defendant. (R.K34-35) According to Dr. Heinrich's testimony, while defendant was



in marriage counseling, he stated he did not want his marriage to end and wanted to do everything possible to keep his marriage together. (R.K37)

This testimony was completely different from the testimony of Dye, who claimed that defendant never loved his wife, only married her for her money, and killed her in a cold-blooded scheme to obtain control of her inheritance. (R.K16) The testimony of Dr. Heinrich and the reports of Dr. Robbins are far more credible and should be given far more credence than the self-serving testimony of Dye.

The above facts demonstrate that Dye has committed crimes of dishonesty throughout his entire life outside of prison. While incarcerated, Dye continues to take advantage of the system by becoming a "jailhouse snitch", who testified against other inmates for his own advantage. The testimony of Dye, however, is completely untrustworthy and should be given no credence by this Honorable Court in assessing whether defendant's sentence was grossly disproportionate and excessive.

Dr. Larry Heinrich, a Licensed Clinical Psychologist and Board-certified Forensic Examiner in Psychology testified that defendant had suffered from depression since 1992, and had been treated by Dr. Kenneth Robbins. (R.K35-36) Defendant suffered from severe emotional and mental disturbance, namely depression at the time of the offense. (R.K39) Dr. Heinrich confirmed that the victim suffered from diabetes which caused kidney and vision problems. (R.K61) Additionally, the victim had a partial facial paralysis as a result of bell's palsy.

(R.K61) The victim was depressed about her failing health conditions and the status of her marriage. (R.K60) Dr. Heinrich referred to a session between the victim and Dr. Robbins where the victim talked of despondencies, hopelessness, and helplessness and feeling a sense of worthlessness and being less of a woman and had passive suicidal ideation ideas. (R.K39-40)

Based on this evidence, it can be seen that the actual offense in this case at bar was a direct cause of defendant's severe emotional, mental disturbance, namely depression and his marital problems. While this certainly does not excuse defendant of this offense, it demonstrates that the actual offense was an aberration in an otherwise law-abiding life. Moreover, this evidence demonstrates that the actual offense was hardly cold and calculated to warrant the 50 year sentence, but was instead the result of stress and depression.

The evidence at sentencing also showed that defendant had excellent rehabilitative potential and a great deal of support from his family and friends, and that defendant demonstrated many admirable qualities in his life. The record contains 30 letters from defendant's siblings, cousins, aunts, uncles, and friends. (S.R.6-46) These letters repeatedly describe defendant as a loving and devoted father, a kind and compassionate person, loyal friend and one who comes to the aid anyone in distress. (S.R.6-46).

---

1. S.R. refers to a supplemental report which contains the letters submitted on defendant's behalf at sentencing.

The record also contains a letter from Marcus Cartlidge, an inmate at Cook County Department of Corrections. In the letter, Cartlidge describes an incident where he was attacked by two other inmates. During this attack, defendant without thinking of the consequences put his own life and well-being in severe jeopardy when he came to Cartlidge's aid, pulling the attackers off of Cartlidge, and prevented Cartlidge from being seriously injured. In the course of helping Cartlidge, defendant was injured himself. (S.R.47) All of these many letters demonstrate that throughout his life, defendant was a decent, caring, and responsible person.

In addition to the letters, the testimony at the sentencing hearing also illustrated the admirable qualities of defendant's life. Gerald Phillips testified that his parents died when he was 14 years old and was forced to live with his sister's mother-in-law. (R.K63-64) Due to the unsuitable family situation, Phillips ran away from home. (R.K63-64) During this period, defendant told Phillips that he could live with defendant's family. (R.K64) Phillips accepted defendant's offer and moved in and as time went on, things worked out so well that Phillips was eventually adopted by defendant's parents. (R.K62-65)

John Kohn, who married defendant's sister, testified about an incident where defendant came to his rescue, saving his life by administering first aid after he had been stabbed severely in the arm and waited until the ambulance and police arrived. (R.K67-70) Kohn also testified he had become friends with defendant and defendant was a loving father. (R.K70)

In two cases with some similar facts, the defendants received much lower sentences than the 50 year sentence imposed on O'Farrell in this case at bar. In People v. Hammerli, 277 Ill.App.3d 873, 662 N.E.2d 452 (1st Dist. 1996), the sentencing court found the defendant had acted methodically and logically in committing the first degree murder of his ex-wife, and then escaping and covering up the offense. Hammerli, 622 N.E.2d at 453-457. Nevertheless, the defendant in Hammerli was sentenced to only 35 years of imprisonment, 15 years less than O'Farrell's sentence.

In People v. Crow, 168 Ill.App.3d 744, 521 N.E.2d 594 (5th Dist. 1988), the defendant planned and carried out the first degree murder of her husband. Crow, 521 N.E.2d at 595-597. Despite the clear premeditated nature of the offense, the defendant in Crow was sentenced to 35 years of imprisonment, 15 years less than the sentence imposed upon O'Farrell.

Additionally, the Illinois Department of Corrections put together the Statistical Presentation of the Illinois Department of Corrections where they compiled and broke-down all the offenses and sentences to assist the reviewing courts in their imposing or reviewing sentences. People v. Neither, 230 Ill.App.3d 546, 595 N.E.2d 126, 127. According to the Statistical Presentation, the average sentence that was imposed for first degree murder in Cook County was 36.8 years in 1996, 37.6 years in 1995, 36.1 years in 1994, and 34.5 years in 1993. Illinois Department of Corrections, Statistical Presentation, 67 (1996). All of these sentences were significantly lower

that both Williams and defendant both suffered from depression at the time of the offense which were brought on by years and years of living a difficult situation which resulted in a sudden and intense passion and both defendants promised their wives that they would end their suffering.

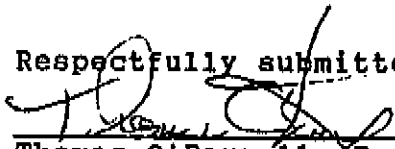
All of these factors--the lack of any prior criminal history, the unique circumstances of the actual offense, many good qualities defendant has demonstrated throughout his life, and the extensive support for defendant from family and friends--show that defendant has a great amount of rehabilitative potential. Despite the actual offense, significant mitigation, the trial court imposed a grossly disproportionate and excessive sentence of 50 years, more than twice the minimum term of 20 years and only 10 years less than the maximum term of 60. Under the Circumstances of this case at bar, such a harsh sentence was an abuse of discretion. Accordingly, this Honorable Court should reduce defendant's sentence.

## VI.

CONCLUSION

WHEREFORE, the Petitioner respectfully requests that this Honorable Court reduce his sentence.

Respectfully submitted,

  
Thomas O'Farrell, Pro-Se,  
Defendant-Appellant  
Inmate #K54340  
P.O. Box 515  
Joliet, Illinois 60432



~~Westlaw.~~

724 N.E.2d 1273 (Table)  
187 Ill.2d 585, 724 N.E.2d 1273 (Table), 244 Ill.Dec. 189  
(Cite as: 187 Ill.2d 585)

Page 1

**H**

People v. O'Farrell  
Ill. 2000.  
(The decision of the Court is referenced in the  
North Eastern Reporter in a table captioned  
"Supreme Court of Illinois Dispositions of Petitions  
for Leave to Appeal".)

Supreme Court of Illinois  
People

v.

Thomas O'Farrell  
NO. 88481

JANUARY TERM, 2000  
February 02, 2000

Lower Court: No. 1-97-0911

Disposition: Denied.

Ill. 2000.  
People v. O'Farrell  
187 Ill.2d 585, 724 N.E.2d 1273 (Table), 244  
Ill.Dec. 189

END OF DOCUMENT





STATE OF ILLINOIS )  
 ) SS  
 COUNTY OF COOK )

IN THE CIRCUIT COURT OF COOK COUNTY  
 COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
 PLAINTIFF-RESPONDENT, )  
 )  
 V. )  
 )  
 THOMAS O'FARRELL, )  
 )  
 DEFENDANT-PETITIONER. )

95 CR 3046301

Valerie Pahls  
**FILED**  
 APR 13 2001  
 DOROTHY BROWN  
 CLERK OF CIRCUIT COURT

### AMENDED POST CONVICTION PETITION

NOW COMES, the Petitioner, THOMAS O'FARRELL, by and through his attorney, DEBORAH J. GUBIN, pursuant to 725 ILCS 5/122-1 and moves this Honorable Court to grant the Defendant a hearing and set aside the conviction and sentence of Defendant and in support thereof states as follows:

1. PETITIONER, THOMAS O'FARRELL, (hereinafter O'FARRELL), was charged with the offense of murder on September 28, 1995.
2. Assistant Public Defender, Joseph Kennelly was appointed to represent O'FARRELL at trial.
3. That the Defendant was tried on such charge before a judge on January 21, 1997. There was a finding of guilty of the offense of Murder.
4. On February 24, 1997 Defendant's Motion for a New Trial was denied and he was sentenced to 50 years in the Illinois Department of Corrections.
5. That there was a substantial violation of the Defendant's constitutional rights under the Constitution of the United States and of Illinois in the following ways:

## I

THE REPRESENTATION BY MR. KENNELLY WAS INEFFECTIVE TO THE EXTENT IT CAUSED A SUBSTANTIAL DENIAL OF O'FARRELL'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND OF ILLINOIS

1. Mr. Kennelly's presentation and argument of the Motions to Quash Arrest and Suppress Evidence and Motion to Suppress Physical Evidence was inadequate.

A. Mr. Kennelly failed to delineate when the arrest of defendant occurred; how the arrest was prior to the revelation of any incriminating evidence and/or probable cause; how the photographs belied the officer's testimony (of the cabinet opening on it's own; how the tape opened on its own; whether the tape box opened on its own or was opened).

i. The Court's ruling pointed this out and by failing to file a motion for reconsideration after obtaining the transcripts and prior to trial he could have pointed out the Court's error as to the scope of search allowed by it being a crime scene and consent to be on the premises. Thompson v. Louisiana, 469 U.S 1197, 105 S.Ct 981 (1984)

ii. O'Farrell's father was able to testify as to the condition and structure of the furniture in question and that it would not open by "bumping it". (Affidavit of Thomas C. O'Farrell).

iii. The testimony at the motion was that the tape container was opened. This exceeds the officers rights to examine the premises for evidence and invades O'Farrell's expectation of privacy. Arizona v. Hicks, 480 U.S. 321, 107 S.Ct. 1149 (1987); People v. Faine, 88 Ill.App.3d 387 (2nd Dist. 1980).

B. Mr. Kennelly failed to ask for reconsideration of the motions on the contradictory testimony of the several officers concerning who and how the tape was opened and the impeaching testimony of the officer at the motion stating it opened on its own and then at trial stating it was opened by the evidence technician.

2. Mr. Kennelly failed to call any witnesses which would have introduced evidence of the emotional state of Defendant and deceased at the time of the incident which would have reduced the matter to Second Degree. Included in this is the emotional and physical condition of the deceased; her statements to defendant's family members.

A. Thomas C. O'Farrell was ready willing and able to testify as to the relationship between O'Farrell and Lesley; his observations of her mental state. (Affidavit of Thomas C. O'Farrell)

B. Mrs. O'Farrell was ready, willing and able to testify as to the deceased's state of mind and her observations of the relationship between O'Farrell and his wife. (Affidavit of Mary A. O'Farrell).

C. Failed to call his medical expert on the effect Lesley's medical condition could have on her mental state in conjunction with her documented "Chronic Depression".

3. In the sentencing hearing failed to cross examine the State's key witness Thomas Dye concerning the legal papers stolen from defendant which contained information used by Mr. Dye in his testimony having the documentation of the theft.

4. In the sentencing hearing failed to request the court to reconsider the pre-trial motion for additional discovery concerning Mr. Dye.

A. In failing to raise the issue of the Court's denial of the motion for additional discovery concerning Mr. Dye effectively waiving it for consideration by the Court and for appellate review.

B. Failed to request the Court to take judicial notice of the Probate Act which would have contradicted the testimony of Mr. Dye, decreasing his credibility.

C. Failed to introduce the Certified Copies of the Final Accounting of the Estate of Lesley Chapman O'Farrell which contradicted the testimony of Mr. Dye, decreasing his credibility.  
(Certified Copy Attached)

5. Failed to properly present mitigating evidence through the expert witness.

A. Mr. Kennelly failed to explain how deceased's view of her disease could be magnified in her mind due to her clinical depression.

B. Mr. Kennelly failed to give an adequate definition of clinical depression and its symptoms and how the deceased exhibited them.

C. Mr. Kennelly failed to have the expert or other witnesses discuss the facts of deceased's life in light of the statement of defendant to the police that she had requested he take her life.

D. Failed to elicit testimony of the physical condition

of the deceased and how, while the doctor told the police it was not terminal at the time of her death, her condition was not such that there would be ever be improvement and that the condition would continue and there would be continued deterioration.

6. Failed to present mitigating evidence through witnesses who would testify to deceased's depressed state of mind and prior suicide attempts. (See Affidavits of Thomas C. O'Farrell and Mary A. O'Farrell).

7. Failed to present mitigating evidence as to motive with Defendant's father who was the Administrator of the deceased's estate as to the small monetary value of the estate. (See Affidavit of Thomas C. O'Farrell and Certified Copy of Final Report of Estate of Lesley Chapman O'Farrell).

8. Failed to request the Court take Judicial Notice of the statutes concerning the probate of estates of minors and that they are closely monitored by the court.

## II

A APPELLATE COUNSEL WAS INEFFECTIVE IN HIS FAILURE TO RAISE CERTAIN ISSUES TO THE EXTENT IT CAUSED A SUBSTANTIAL DENIAL OF O'FARRELL'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND OF THE STATE OF ILLINOIS

1. Appellate should have raised as an issue on appeal the denial of the Motion to Quash Arrest and Suppress Evidence. See the argument concerning Mr. Kennelly's failure to raise request a reconsideration of the motion.

2. The denial of the Motion to Suppress Physical Evidence. The case law was misinterpreted by the trial court and should have been brought before the Appellate Court for review.

3. Trial counsel's ineffective representation at trial and at the sentencing hearing.

4. The denial of Defendant's motion for additional discovery concerning Mr. Dye.

5. Prosecutorial misconduct in the obtaining and presenting of Mr. Dye's testimony without first determining its veracity considering Mr. Dye's history.

A. There was prosecutorial misconduct in the presentation of the testimony of Mr. Dye as the prosecutors were made aware of accusations against Mr. Dye in his taking legal papers from Defendant

B. There was prosecutorial misconduct in calling Mr. Dye, knowing Mr. Dye's history of calling prosecutors to obtain lesser sentences in exchange for testifying.

C. There was prosecutorial misconduct in failing to tender information concerning all of Mr. Dye's involvement as a witness for the State in various cases.

### III

#### DEFENDANT'S CONSTITUTIONAL RIGHTS WERE DENIED BY THE COURT

##### ALLOWING MR. DYE TO TESTIFY

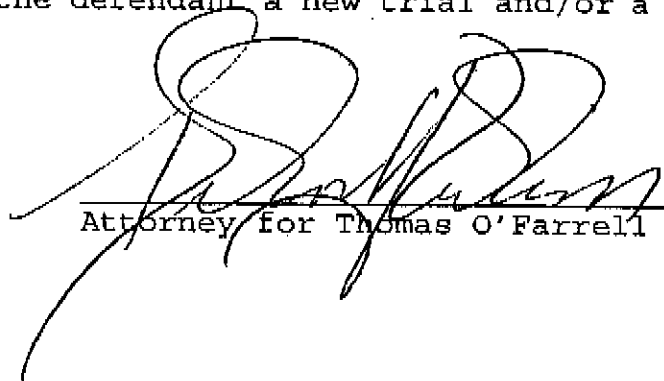
1. The Court erred in allowing Mr. Dye to testify without taking steps to insure Defendant was tendered all information due

under Brady v. Maryland.

2. This was compounded by the Court failing to take Judicial Notice of applicable statutes concerning the Probate of Minor Estates laws in Illinois.

The supporting affidavits, records, are attached hereto as Exhibits and incorporated thereby in support of the defendant's motion.

WHEREFORE, the defendant prays that this Court set aside the finding of guilty and grant the defendant a new trial and/or a new sentencing hearing.



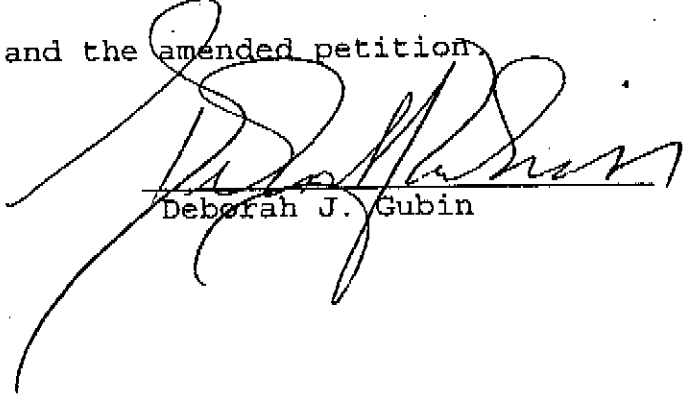
Attorney for Thomas O'Farrell



## CERTIFICATION

I, DEBORAH J. GUBIN, state the following:

1. I am an attorney, licensed in the State of Illinois.
2. I have been appointed to represent Petitioner, THOMAS O'FARRELL, on his Post-Conviction Petition.
3. I have reviewed the pro-se petition filed by Petitioner; the record and transcripts filed on appeal; the brief filed by appellate counsel.
4. I have met with Petitioner in person and discussed the contents of the pro-se petition and the amended petition.



Deborah J. Gubin

Deborah J. Gubin  
605 W. Madison  
Suite 331  
Chicago, IL 60661  
(312) 902-3149  
Att. No. 55073



NOTE: T. Colleen McSwain  
FILED Motion on February 15, 2000

STATE OF ILLINOIS)

COUNTY OF COOK )

) SS

FILED

JAN 26 4 23 PM '00  
IN THE CIRCUIT COURT OF COOK COUNTY  
COUNTY DEPARTMENT - CRIMINAL DIVISION  
CRIMINAL COURTPEOPLE OF THE STATE OF ILLINOIS, )  
PLAINTIFF-RESPONDENT, )

CASE NO. 95 CR 3046301

v. )  
THOMAS O'FARRELL, )  
DEFENDANT-PETITIONER, )

JUDGE \_\_\_\_\_

## MOTION FOR DIFFERENT JUDGE TO CONSIDER

NOW COMES, Defendant, Thomas O'Farrell, Pro-Se, and request this Honorable Court enter an order granting Defendants Motion For Different Judge To Consider pursuant to Ill. Rev. Stat. 725 ILCS 5/122-8. In support of this motion Defendant states as follows:

1) The Trial Court is mentioned within Defenanant-Petitioners Post-Conviction Petition under Judicial Misconduct therefore, Defendant believes that the Trial Court will be bias against his petition.

2) The Trial Court prior to the Defendants trial in this cause had determined Defendants guilt and sentence prior to any evidence be offered therefore Defendant was prejudiced by Trial Courts bias action.

WHEREFORE, Defendant prays, that this Honorable Court grant said motion and enter an order for a different judge to hear Defendants Post-Conviction Petition.

Subscribed and Sworn to before me  
on this 30 day of January, 2000

Respectfully submitted,  
*Thomas O'Farrell*  
Thomas O'Farrell, Pro-Se

*Jeannine Kohlmeier*  
Notary Public

OFFICIAL SEAL  
Jeannine Kohlmeier  
Notary Public State of Illinois  
My Commission Expires 11/13/2001

EXHIBIT F

00124



1 STATE OF ILLINOIS )  
2 COUNTY OF COOK ) SS:

3 IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
4 COUNTY DEPARTMENT-CRIMINAL DIVISION

5 PEOPLE OF THE STATE OF ILLINOIS )  
6 -vs- ) No. 95 CR 30463  
7 THOMAS O'FARRELL )

8 REPORT OF PROCEEDINGS had at the  
9 hearing of the above-entitled cause before Colleen  
10 McSweeney-Moore, one of the judges of said division, on the 15th  
11 day of February, A.D., 2000.  
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B-1

EXHIBIT G

-17

1 THE CLERK: Thomas O'Farrell, sheet one.

2 THE COURT: Defendant filed a pro se petition for  
3 post-conviction relief before Judge Toomin.

4 He also filed a motion entitled motion for different  
5 judge to consider. It is a two paragraph motion. It is not  
6 supported by affidavit pursuant to the statute. He alleges  
7 that -- he mentions that the judge is under judicial misconduct  
8 and, therefore, the judge would be biased against him. There is  
9 no such allegation in his petition.

10 And he also alleges that since the trial court also  
11 found the Defendant guilty and sentenced him, therefore, he would  
12 be prejudiced.

13 The Defendant's motion does not rise to a level of  
14 allegations to substitute Judge Toomin for cause. It is  
15 unsupported pursuant to the statute. It's heard and denied.  
16 Transfer instanter to Judge Toomin.

17 (Which were all the proceedings had)

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1 STATE OF ILLINOIS )  
2 ) SS:  
3 COUNTY OF C O O K )

4 I, ELIZABETH A. REYES, Official Shorthand Reporter of  
5 the Circuit Court of Cook County, County Department-Criminal  
6 Division, do hereby certify that I reported in shorthand the  
7 evidence had in the above-entitled cause and that the foregoing  
8 is a true and correct transcript of all the evidence heard.  
9

10   
11 Official Shorthand Reporter  
12 License No. 084-001910  
13 Circuit Court of Cook County  
County Department  
Criminal Division

14 Dated this 30th day of April A.D., 2004.  
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ORDER

FILED

IN THE APPELLATE COURT, STATE OF ILLINOIS  
FIRST DISTRICT

2001 MAR 28 PM 4:10

DOROTHY BROWN  
CLERK OF THE CIRCUIT COURT  
EXECUTIVE OFFICEPeople  
Ansell

v.

Thomas O'Farrell  
Ansellant

NO. 00-968

ORDER

On motion of appellent, *no so*,  
to withdraw his appeal - 00-968, *as a* Ford  
petition having been filed.

*At 6 Hourly Exempt*  
appellent, *no so's* motion to withdraw  
his appeal is allowed.

RECEIVED

APR 02 2001

CLERK OF THE CIRCUIT COURT  
CRIMINAL DIVISION

ORDER ENTERED

JAN 31 2001

APPELLATE COURT, FIRST DISTRICT

Name  
Attorney for  
Address  
City  
Telephone

Thomas O'Farrell  
K 54340  
PO Box 99  
Portage, IL 60171

Justice

Justice

Justice

EXHIBIT H

GILBERT S. MARCHMAN, CLERK OF THE APPELLATE COURT, FIRST DISTRICT

CASE NO. 08CV2403

ATTACHMENT NO. 1 (EXHIBITS A-DD)

EXHIBIT \_\_\_\_\_

TAB (DESCRIPTION) \_\_\_\_\_



**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS**  
**COUNTY DEPARTMENT, CRIMINAL DIVISION**

---

PEOPLE OF THE STATE OF ILLINOIS, )

Plaintiff-Respondent )

THOMAS O'FARRELL, )

Defendant-Petitioner. )

---

Post-Conviction  
No. 95 CR 30463

Amina Thompson  
**FILED**

OCT 04 2001

**DOROTHY BROWN**  
CLERK OF CIRCUIT COURT

**RULING ON RESPONDENT'S MOTION TO DISMISS**

Petitioner, Thomas O'Farrell, seeks post-conviction relief from the judgment of conviction entered in the above-entitled cause on February 24, 1997. On that date, following a bench trial, this court sentenced O'Farrell to a term of fifty years imprisonment for the offense of first degree murder, in violation of Section 9-1-A of the Illinois Criminal Code. 720 ILCS 5/9-1A (West 1992). As grounds for relief, petitioner claims that: 1) the trial court failed to insure that all *Brady* material relating to a State's witness was tendered to his attorney; 2) the court failed to take judicial notice of applicable law concerning the probate of minors' estates; 3) he was denied the effective assistance of both trial and appellate counsel; and 4) he received an excessive sentence.

Respondent has moved to dismiss this proceeding asserting that the amended petition fails to raise any constitutional questions within the purview of the Post-Conviction Hearing Act, that the claims presented are barred by the doctrines of *res*

*judicata* and waiver, and that the petition fails to establish the requisite deficient performance and resulting prejudice required to support a claim of ineffective assistance of counsel.

Having taken the matter under advisement and having considered the pleadings, exhibits and trial record, the court will address the issues raised within the framework of the arguments offered by counsel.

### **BACKGROUND**

The instant prosecution stemmed from the fatal shooting of petitioner's wife, Lesley O'Farrell, in the early morning hours of September 28, 1995. Mrs. O'Farrell was shot and killed by two gunshot wounds while laying in her bed at the family residence located at 3435 West Ardmore Street in the City of Chicago.

Following arraignment, defense counsel presented motions to suppress physical evidence as well as petitioner's statements. After evidentiary hearings were concluded, the court denied the motions, however it barred introduction of a letter written by the victim which had been recovered from her dresser. Later, the court likewise denied petitioner's motion to suppress statements made to Thomas Dye, a police informant, while the two were inmates at the Cook County Jail.

Petitioner waived his right to a jury and the matter proceeded to trial before this court. At trial, the evidence disclosed that at 4:20 a.m., Chicago Police officers received a radio transmission that a shooting or a burglary was in progress at petitioner's home. Responding to the call, Officer Veronica Pettry testified that she encountered petitioner and his son who were sitting on the base of a staircase inside the home. Petitioner was bleeding from a gunshot wound to his shoulder and informed the officers that he and his

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wife had been shot by an intruder who entered their second floor bedroom. He described the shooter as "a six foot three inch, black man with short black hair, approximately 200 pounds." (See R. Vol. IV at 26). Petitioner told Officer Pettry that he was awakened by a loud boom and then observed the intruder. O'Farrell claimed that as he tried to disarm the offender he was shot in the ensuing struggle, and that he thought the intruder was also shot. After checking the upstairs bedroom, the police confirmed that petitioner's wife was dead.

An ambulance was summoned and O'Farrell was taken to Illinois Masonic Hospital, together with his four-year old son. Officer Ronald Cooper accompanied them and enroute petitioner repeated the version of the shooting that he had given to the responding officers. While being treated for his shoulder wound, petitioner was interviewed by Detective William Kernan and again repeated the story he had previously told at his home and enroute to the hospital. After being treated and released from the hospital petitioner agreed to accompany the officers to Area Five headquarters to continue the interview.

Evidence technician Patrick Moran was assigned to investigate the murder scene and discovered that a pane of window glass was missing from a first floor window. On the second floor he noted two bullet holes in the wall and found pictures and broken frames on the hallway floor. He also observed the victim lying on the right side of the bed, face-up, with a pillow across her legs containing two bullet holes with corresponding powder burns. Closer examination revealed gunshot wounds to the victim's head and upper chest. Detective Henry Collins was also present and testified that as he bumped into a television cabinet located in the master bedroom, a video cassette box opened and fell

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out revealing a single-shot Derringer pistol, some expended shell casings and a hypodermic needle.

Detective Richard Schak interviewed petitioner at Area Five and inquired as to whether there would be any reason for a gun to be in his bedroom. Petitioner, however, denied that any gun was at his home. Sensing that O'Farrell was now a suspect, rather than a witness, Schak administered *Miranda* warnings, after which petitioner readily admitted that he had killed his wife pursuant to a mutually conceived plan. Petitioner told Schak that his wife was a diabetic and was beginning to experience kidney failure. She had also been diagnosed with Bell's Palsy and was concerned about being disfigured. O'Farrell further explained that when he arrived home from work that evening his wife produced the weapon and asked him to shoot her after she fell asleep. Earlier, she had removed a glass pane from the downstairs bathroom window to make it look like an intruder had entered. After 4:00 a.m., petitioner decided to implement the plan and fired a shot into his wife's skull through a pillow while she was lying in the bed. A second shot was directed to her chest. Petitioner fired a third shot in the hallway and, after shooting himself in his shoulder, he put the gun in the video cassette box and then called 911.

O'Farrell was also interviewed by Assistant State's Attorney Tom Koungias and essentially repeated what he had told Detective Schak. The parties further stipulated that Dr. Nancy Jones, the medical examiner, would testify that, while performing a post-mortem examination upon the victim, she removed two bullets from her remains. In her opinion the cause of death was multiple gunshot wounds. Additionally, a gunshot residue test administered to O'Farrell revealed the presence of residue on his left hand, indicating

that petitioner had handled, fired or been in close proximity to a weapon when it was discharged. (See R. Vol. IV at 140)

At the conclusion of the trial petitioner was found guilty of two counts of first degree murder. In the capital sentencing hearing that followed, petitioner again waived jury and the issue of eligibility was initially presented to this court. When the proofs were concluded the court determined that the State had failed to prove beyond a reasonable doubt that the murder had been committed in a cold, calculated and premeditated manner pursuant to a preconceived plan.

A non-capital sentencing hearing was later convened wherein the State in aggravation presented Thomas Dye, a police informant, who testified regarding conversations he shared with petitioner while they were cellmates in the Cook County Jail. According to Dye, O'Farrell told him that he preplanned to kill his wife, that he did not like her, but stayed with her to solidify the insurance money that was coming from her grandparents. Although O'Farrell's son would inherit the money, petitioner related that he would be in a position to control the inheritance during his son's minority. Petitioner further expressed his hope to be found guilty of second degree murder because his father was a police officer, his wife's illness would support the claim of a mercy killing and he had no criminal record.

In mitigation, the defense presented Dr. Larry Heinrich, a licensed clinical psychologist who had evaluated petitioner for fitness and sanity during the course of the trial proceedings. Dr. Heinrich concluded that petitioner suffered from chronic depression related to family and personal issues. He also noted that the victim had manifested passive suicidal ideation and wishes during therapy sessions.

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At the conclusion of the hearing, petitioner was sentenced to a term of fifty years imprisonment in the Illinois Department of Corrections. A direct appeal was taken to the Illinois Appellate Court, First Judicial District, wherein petitioner contended that:

- 1) He received an excessive sentence;
- 2) The mittimus should be amended to reflect that he was convicted and sentenced for only one count of first degree murder; and
- 3) He should not have been subject to the truth-in-sentencing law because it violated the single-subject rule of the Illinois Constitution.

In affirming petitioner's conviction, while rejecting claims one and two, the reviewing court modified the mittimus in conformity with *People v. Reedy*, 295 Ill. App.3d 34, 44, 692 N.E.2d 376 (1998), to reflect petitioner's entitlement to receive one day of good conduct credit for each day of service in prison. *People v. Thomas O'Farrell*, No. 1-97-0911 (1999), (unpublished order under Supreme court Rule 23).

Although O'Farrell sought further review in the Illinois Supreme Court, his petition for leave to appeal was denied on February 2, 2000. See, *People v. O'Farrell*, 187 Ill.2d 585, 724 N.E.2d 1273 (2000). The record does not reflect whether petitioner thereafter filed a petition for *certiorari* in the United States Supreme Court.

#### ANALYSIS

Mr. O'Farrell commenced this proceeding on January 26, 2000, upon the filing of his *pro se* post-conviction petition. Although petitioner also sought to disqualify this court upon allegations of bias, his motion for substitution of judges was heard and denied by Judge Colleen McSweeney Moore on February 15, 2000. The matter was then returned to this court and counsel was appointed to represent petitioner. On April 13, 2001, an amended post-conviction petition was filed with petitioner's concurrence. On May 7,

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2001, petitioner filed an amendment to the amended petition, adding the claim of excessive sentence.

The instant proceeding is presently before this court pursuant to Section 122-1 of the Post-Conviction Hearing Act (hereinafter, the "Act"). 725 ILCS 5/122-1 (West 2001). A post-conviction proceeding is not a direct appeal, but rather, is a collateral attack on prior judgment. *People v. Barrow*, 195 Ill.2d 506, 519, 749 N.E.2d 892, 901 (2001). The issues raised on post-conviction review are limited to those which could not or were not previously raised on direct appeal or in prior post-conviction proceedings. *People v. McNeal*, 194 Ill.2d 135, 140, 742 N.E.2d 269, 272 (2001). Under the Act, a petitioner enjoys no entitlement to an evidentiary hearing. *People v. Cloutier*, 191 Ill.2d 392, 397, 732 N.E.2d 519, 523 (2000). In order to obtain a hearing, the petitioner has the burden of establishing that a substantial violation of his constitutional rights occurred at trial or sentencing. *People v. Johnson*, 191 Ill.2d 257, 268, 730 N.E.2d 1107, 1111 (2000).

At the outset, it should be noted that, from an analysis of the instant petition and the appellate opinion affirming his conviction, it is apparent that several of petitioner's allegations involve matters of record which were raised or could have been raised on direct appeal. Among these are petitioner's claims that 1) he received ineffective assistance of trial counsel; 2) that his constitutional rights were denied by this court's decision to allow the testimony of Thomas Dye; and 3) that he received an excessive sentence. The law is unmistakably clear:

The scope of post-conviction review is limited to matters which have not been, and could not have been, previously adjudicated. Thus, determinations of the reviewing court on direct review are *res judicata* as to issues actually decided, and issues that could have been raised on direct appeal, but were not, are waived.

*People v. Mack*, 167 Ill. 2d 525, 531, 658 N.E.2d 437, 440 (1995).

Accordingly, each of the aforementioned claims are barred by the doctrines of *res judicata* and waiver. However, even absent these procedural bars, it is doubtful that petitioner's position here would be substantially enhanced.

As noted, O'Farrell asserts that he was denied the effective assistance of both trial and appellate counsel. In assessing such claims, Illinois courts follow the two-prong test of *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed.2d 674, 693, 104 S.Ct. 2052, 2064 (1984). Under this standard, petitioner must show that counsel's representation fell below an objective standard of reasonableness, and that, but for this deficiency, there is a reasonable probability that counsel's performance was prejudicial to the defense. *People v. Albanese*, 104 Ill.2d 504, 525-26, 473 N.E.2d 1246, 1255 (1984). "Prejudice exists when 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *People v. Erickson*, 183 Ill.2d 213, 224, 700 N.E.2d 1027, 1032 (1998)(citations omitted). A petitioner's failure to make the requisite showing of either deficient performance or sufficient prejudice defeats an ineffectiveness claim. *People v. Morgan*, 187 Ill.2d 500, 529-30, 719 N.E.2d 681, 698 (1999). The *Strickland* standard is also used when reviewing the performance of appellate counsel. *People v. Hayes*, 279 Ill. App.3d 575, 580-81, 665 N.E.2d 419, 423 (2<sup>nd</sup> Dist. 1996).

Neither mistakes in strategy nor the fact that another attorney with the benefit of hindsight would have proceeded differently is sufficient to establish ineffective assistance of counsel. *People v. Trotter*, 299, Ill. App.3d 535, 539, 701 N.E.2d 272, 275 (1<sup>st</sup> Dist.

1998). Indeed, to ruminate over the wisdom of counsel's advice is precisely the kind of retrospection proscribed by *Strickland*, and its progeny. See, *Strickland*, 466 U.S. at 689, 80 L.Ed.2d at 694, 104 S.Ct. at 2065 (a fair assessment of attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight).

Consideration will first be given to petitioner's claim that trial counsel's presentation and argument on the pre-trial motions to suppress was inadequate. Although petitioner boldly claims that his attorney failed to establish that the arrest occurred prior to the revelation of any incriminating evidence or probable cause, that claim is refuted by the record. At the hearing on the motion to quash arrest, petitioner acknowledged that upon his release from Illinois Masonic Hospital he told the police "that I would voluntarily come over and answer their questions." (See R. Vol. I at 36). Petitioner was not handcuffed or viewed as a suspect; his status initially was that of a witness. Detective Schak's testimony clearly established that probable cause to arrest petitioner later arose stemming from the recovery of the Derringer in the master bedroom, coupled with petitioner's denial of knowledge of its presence. Petitioner likewise faults trial counsel for failing to contest the court's ruling that the search of the premises was consensual, yet the court's finding of consent was clearly established from the testimony. As the court noted in its ruling, petitioner initially invited Officer Maderer into his home and authorized him to continue his investigation before being taken to Illinois Masonic. Contrary to petitioner's claim, the court did not rely upon any crime scene exception to the Fourth Amendment, but rather upon "uncontroverted evidence of consent." (See R. Vol. II at G-31).

Petitioner further asserts that trial counsel was incompetent for failing to call his father, Thomas C. O'Farrell, to testify on the motion to suppress. In general, whether to

call a particular witness is a matter of trial strategy. *People v. Flores*, 128 Ill.2d 66, 106, 538 N.E.2d 481, 488 (1989). Nevertheless, failure to call a potential witness for the defense may indeed support an ineffectiveness claim. *People v. Barry*, 202 Ill. App.3d at 216, 559 N.E.2d at 922. Although petitioner has produced an affidavit from Mr. O'Farrell, given the court's finding of consent, it falls far short of establishing that a different result would have obtained had he testified.

Petitioner additionally claims that defense counsel's failure to move for reconsideration of the denial of the motion to suppress constituted ineffective assistance of counsel. It should be noted that in support of the motion, counsel sought reliance upon the Supreme Court's, holding in *Thompson v. Louisiana*, 469 U.S. 17, 83 L. Ed.2d 246, 105 S.Ct. 409 (1984), the same case noted in the amended petition. (See, R. Vol. V at K-4). Moreover, although trial counsel did not file a motion to reconsider, the record reflects that he preserved the issues for appellate review in petitioner's motion for new trial. (See, CLR at 72-73). Inasmuch as this court found the allegations to be meritless, had they been preserved in a motion for reconsideration earlier in the proceedings, it is manifest that they would have suffered an identical fate.

Deficient performance is also claimed as a result of trial counsel's failure to present evidence of the emotional state of both petitioner and the victim at the time of the occurrence. Petitioner submits that had such evidence been introduced, it would have reduced the grade of homicide to second-degree murder. However, petitioner fails to enlighten the court as to how the emotional state of either himself or the victim could conceivably have warranted a reduction in the degree of homicide under the facts of this case. In Illinois, once the State has proven first-degree murder beyond a reasonable

doubt, to support a second-degree finding the defendant must prove by a preponderance of the evidence that he was acting under a sudden and intense passion resulting from serious provocation by the victim or that he believed that the circumstances justified using self-defense, but that his belief was unreasonable. *People v. Shumpert*, 126 Ill.2d 344, 351, 533 N.E.2d 1106, 1109 (1989).

Because no claim of self-defense has been interposed here, petitioner must necessarily be relying on the theory that, at the time of the shooting, he was acting under sudden and intense passion resulting from serious provocation by his wife. Petitioner's reliance upon the theory of serious provocation is clearly misplaced. As the Illinois Supreme Court observed in *People v. Chevalier*, 131 Ill.2d 66, 71, 544 N.E.2d 942, 944 (1989), the only categories of serious provocation which have been recognized are substantial physical injury or assault, mutual quarrel or combat, illegal arrest, and adultery with the offender's spouse; but not mere words or gestures or trespass to property. (See also, Smith-Hurd Annot., 720 ILCS 5/9-2, Committee Comments). Under the circumstances presented here, competent counsel would not have reasonably perceived that the emotional state of petitioner or the victim would suffice to establish the requisite element of serious provocation to support a second-degree murder finding.

Petitioner's remaining allegations of trial counsel's incompetence encompass purported deficiencies in the conduct of his sentencing hearing. Specifically, petitioner faults his attorney's failure to request the court to reconsider its decision denying additional discovery regarding Thomas Dye, as well as his failure to cross-examine Dye concerning his theft of petitioner's legal papers. Petitioner takes further issue with counsel's failure to utilize applicable probate statutes to refute Dye's testimony.

Additionally, petitioner submits that trial counsel failed to properly present mitigating evidence through expert witnesses as well as petitioner's parents.

Addressing petitioner's contentions as to Thomas Dye, the record demonstrates with considerable clarity that this court was fully apprised of Mr. Dye's nefarious background and its resulting effect upon his credibility. In his cross-examination of Dye, defense counsel brought out that the witness had fourteen felony convictions, that he had provided information to prosecutors for his benefit in the past, that he supported himself as a drug dealer for periods of time and that he had access to petitioner's property when they were cellmates. (See, R. Vol. V at K21-29). Moreover, it is apparent from the record that Dye's testimony had no effect upon the sentence imposed by this court. Defense counsel's argument that Dye's testimony was absolutely worthless clearly resonated with the court for at no time in imposing sentence was mention made of Thomas Dye or the motive of financial gain that he ascribed to petitioner. (See R. Vol. V at K83-87). As to counsel's failure to properly present mitigating evidence, it should be recalled that counsel did present the testimony of Dr. Larry Heinrich, a highly regarded clinical psychologist, as well as certain family members. Petitioner has made no showing in his amended petition that had additional mitigation evidence been presented, a different sentence would have resulted.

Petitioner further asserts that appellate counsel was ineffective for failing to raise certain issues complained of herein on direct appeal. Although it is manifest that a criminal defendant is guaranteed the effective assistance of counsel on appeal, *Evitts v. Lucey*, 469 U.S. 387, 396-97, 83 L.Ed.2d 821, 829-30, 105 S.Ct. 830, 836-37 (1985), effective assistance in a constitutional sense means competent, not perfect, representation.

*People v. Odle*, 151 Ill.2d 168, 173, 601 N.E.2d 732, 735 (1992). The two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 80 L.Ed.2d 674, 693, 104 S.Ct. 2052, 2064 (1984), is utilized in reviewing the performance of trial and appellate counsel alike. *People v. Childress*, 191 Ill.2d 168, 175, 730 N.E.2d 32, 36 (2000). As the Illinois Supreme Court has recognized:

A defendant who contends that appellate counsel rendered ineffective assistance, e.g., by failure to argue an issue, must show that the failure to raise that issue was objectively unreasonable and that, but for this failure, defendant's conviction or sentence would have been reversed.

*People v. Richardson*, 189 Ill.2d 401, 412, 727 N.E.2d 362, 369-70 (2000); See also, *People v. Stewart*, 141 Ill.2d 107, 119, 565 N.E.2d 968, 973 (1990), and *People v. Caballero*, 126 Ill.2d 248, 270, 533 N.E.2d 1089, 1096 (1989).

Significantly, appellate counsel's judgment as to what issues should be raised and argued on appeal is generally not to be questioned, and may be grounds for post-conviction relief only if patently erroneous. *People v. Wilson*, 273 Ill. App.3d 71, 75, 652 N.E.2d 405, 408 (3<sup>rd</sup> Dist. 1995). Clearly, appellate counsel is under no obligation to brief every conceivable argument on appeal. *People v. Coleman*, 168 Ill.2d 509, 523, 660 N.E.2d 919, 928 (1995); *People v. Collins*, 153 Ill.2d 130, 140, 606 N.E.2d 1137, 1142 (1992); *People v. Barnard*, 104 Ill.2d 218, 230, 470 N.E.2d 1005, 1009 (1984); *People v. Porter*, 141 Ill. App.3d 208, 211, 490 N.E.2d 47, 50 (1<sup>st</sup> Dist. 1986). "It is not incompetence for counsel to refrain from raising those issues which, in his judgment, are without merit." *People v. Sanders*, 209 Ill. App.3d 366, 377, 568 N.E.2d 200, 207 (1<sup>st</sup> Dist. 1991)(citations omitted).

and



Here, appellate counsel's decision not to raise the issues now asserted cannot be deemed "patently erroneous." For example, counsel's decision not to raise the issue of the court's denial of petitioner's pre-trial motions could well be grounded upon counsel's belief that the issues had little merit or likelihood of being successful on appeal. This is likewise true with respect to the issues surrounding Thomas Dye, for a careful reading of the record would have alerted appellate counsel to the fact that the court placed utterly no reliance upon Dye's proffers at sentencing.

Petitioner also challenges appellate counsel's failure to raise the issue of trial counsel's incompetence. Where such claims are made, the focus necessarily must be on the trial attorney's performance. *People v. Coleman*, 168 Ill.2d 509, 522-23, 660 N.E.2d 919, 927 (1995); *People v. Guest*, 166 Ill.2d 381, 390, 655 N.E.2d 873, 877 (1995). Here, the court has already considered the allegations of trial counsel's incompetence and found them to be lacking. Because the underlying claims of ineffectiveness lack support, petitioner's claims of ineffective assistance of appellate counsel are likewise without merit. *People v. Zambrano*, 266 Ill. App.3d 856, 865, 640 N.E.2d 1334, 1341 (1<sup>st</sup> Dist. 1994). "Obviously, if the underlying claim lacks merit, defendant suffered no prejudice due to appellate counsel's failure to raise the issue on direct appeal." *People v. Johnson*, 183 Ill.2d 176, 187, 700 N.E.2d 996, 1002 (1998).

Petitioner further submits that the court's admission of Dye's testimony resulted in a denial of his constitutional rights. Because this issue could have been raised on direct appeal the doctrine of waiver serves to bar consideration of this claim here. Moreover, as previously noted, the record of the trial proceedings fails to reflect that Mr. Dye's pronouncements were in any manner relied upon by this court at sentencing.

all

Finally, O'Farrell asserts that his right to due process and equal protection of the law were denied by the excessive sentence imposed by the court. According to petitioner, the excessiveness of his sentence is highlighted by his lack of criminal history, evidence of his state of depression, as well as the victim's, her degenerative physical condition, and his strong family history. As noted earlier, the excessive sentence claim was presented on direct appeal and rejected by the reviewing court. The doctrine of *res judicata* prevents further consideration here. Furthermore, the mere alleged excessiveness of a sentence which was within the statutory limits when imposed does not create a constitutional issue which may serve as a basis for post-conviction relief. *People v. Ballinger*, 53 Ill.2d 388, 390, 292 N.E.2d 400, 401 (1973); *People v. Hoffman*, 25 Ill.App.3d 261, 271, 322 N.E.2d 865, 872-73 (1<sup>st</sup> Dist. 1974); *People v. Wenger*, 42 Ill.App.3d 608, 610, 356 N.E.2d 432, 434 (4<sup>th</sup> Dist. 1976). In Illinois, at the time of petitioner's sentencing, the sentencing range for first degree murder was twenty to sixty years. 735 ILCS 5/5-8-1 (West 1992). Because petitioner's sentence clearly falls within the statutorily authorized limits, he has failed to raise a claim cognizable under the Act.

MUA

**CONCLUSION**

Based upon the foregoing discussion, the court finds that petitioner has failed to make a substantial showing that his constitutional rights were violated in either the trial or appellate proceedings. The court therefore grants respondent's motion and hereby dismisses the instant proceeding for post-conviction relief.

**ENTERED:**



Michael P. Toomin  
Circuit Court of Cook County  
Criminal Division

**DATED:** 06/17/2008



STATE OF ILLINOIS)

) \$\$

COUNTY OF COOK

IN THE CIRCUIT COURT OF COOK COUNTY

PEOPLE OF THE STATE OF ILLINOIS,)

PLAINTIFF-RESPONDENT, )

Circuit court of

Cook County,

-v-

No. 95 CR 30463

THOMAS O'FARRELL,

DEFENDANT-PETITIONER, )

Michael P. Toomin

Judge Presiding

MOTION FOR LEAVE TO FILE AND PROCEED IN FORMA PAUPERIS

NOW COMES, Defendant, Thomas O'Farrell, Pro-Se, and request

In support of this Motion Defendant states as follows:

1) That Defendant is in the custody of the State of Illinois,

2) That Defendant is without funds, assets, personal, or

WHEREFORE, Defendant prays that this Honorable Court will

Respectfully submitted,

Thomas O'Farrell, Pro-Se,

Defendant-Petitioner

STATE OF ILLINOIS)  
COUNTY OF COOK ) ss  
)

IN THE CIRCUIT COURT OF COOK COUNTY  
COUNTY DEPARTMENT - CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS,) Appeal from the  
PLAINTIFF-RESPONDENT,) Circuit Court of  
) Cook County, Illinois  
-v- )  
) No. 95 CR 30463  
THOMAS O'FARRELL,) Michael P. Toomin  
DEFENDANT-PETITIONER,) Judge Presiding

MOTION FOR APPOINTMENT OF APPELLATE PANEL COUNSEL  
OR PRO-BONO COUNSEL

NOW COMES, Defendant, Thomas O'Farrell, Pro-Se, and request  
this Honorable Court enter an order granting Defendants Motion.

In support of this Motion Defendant states as follows:

1) Defendant is in the custody of the State of Illinois,  
under the Department of Corrections of said State, pursuant to  
an order entered February 24, 1997 under indictment number  
in the Circuit Court of Cook County, Illinois.

2) That Defendant is without funds, assets, personal, or  
real property to pay the costs of counsel in the Appeal  
proceedings.

3) Defendant is now Appealing the ruling on Defendants  
Post-Conviction Petition, where Defendant raised Ineffective  
Assistance of Trial Counsel an Assistant Public Defender and  
of Appellate Counsel an Assistant State Appellate Defender.

4) Defendant firmly believes that the Public Defenders  
Office and the Office of the State Appellate Defender will

**FILED**  
NOV 08 2001  
DOROTHY BROWN  
CLERK OF CIRCUIT COURT

not defend Defendant to the best of their ability on Defendants Appeal due to the issue of Ineffective Assistance of Counsel on both an Assistant Public Defender and on Appellate Counsel an Assistant Appellate Defender. Defendant believes that the Offices of the Public Defender and State Appellate Defender would proceed half-heartedly on filing Defendants Appeal, therefore violating Defendants Rights to Due Process secured to all in the State of Illinois and United States Constitutions.

WHEREFORE, Defendant prays that this Honorable Court will grant Defendants Motion and appoint either an Appellate Panel Counsel or Pro-Bono Counsel to represent Defendant in the Appeal to the Appellate Court of Illinois, First Judicial District.

Respectfully submitted,



Thomas O'Farrell, Pro-Se,  
Defendant-Petitioner

STATE OF ILLINOIS)

) SS

COUNTY OF COOK

IN THE CIRCUIT COURT OF COOK COUNTY

PEOPLE OF THE STATE OF ILLINOIS, )

PLAINTIFF-RESPONDENT, )

Appeal from the

Circuit Court of

Cook County, Illinois

-v-

No. 95 CR 30463

THOMAS O'FARRELL,

DEFENDANT-PETITIONER, )

Michael P. Toomin

Judge Presiding

# AFFIDAVIT OF INTENT TO FILE AN APPEAL

NOW COMES, Defendant, Thomas O'Farrell, Pro-Se, Defendant.

Petitioner who states as follows:

1) That the above captioned cause was decided by the:

Honorable Michael P. Toomin on October 4, 2001.

NOV 08 2001

**DOROTHY BROWN**

2) That Defendant intends, in good faith to file an Appeal

to the Appellate Court of Illinois, First Judicial District

in the above captioned cause.

3) That the undersigned, first being duly Sworn on oath,

deposes and states that the statements contained herein are true

in substance and in fact.

Respectfully submitted,

Thomas O Farrell, Pro-se,

Defendant-Petitioner



STATE OF ILLINOIS)  
 ) ss  
 COUNTY OF COOK )

IN THE CIRCUIT COURT OF COOK COUNTY  
 COUNTY DEPARTMENT - CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS,) Appeal from the  
 PLAINTIFF-RESPONDENT,) Circuit Court of  
 ) Cook County, Illinois  
 -v- )  
 ) No. 95 CR 30463  
 THOMAS O'FARRELL,) Michael P. Toomin  
 DEFENDANT-PETITIONER,) Judge Presiding

**FILED**

MOTION FOR TRANSCRIPTS AND COMMON LAW RECORDS

NOV 08 2001

NOW COMES, Defendant, Thomas O'Farrell, Pro-Se, and requests DOBOTHY BROWN  
 CLERK OF CIRCUIT COURT  
 this Honorable Court enter an order granting Defendants Motion.

In support of this Motion Defendant states as follows:

1) Defendant is in the custody of the State of Illinois,  
 under the Department of Corrections of said State, pursuant to  
 an order entered February 24, 1997 under indictment number above  
 in the Circuit Court of Cook County, Illinois.

2) That Defendant is without funds, assets, personal, or  
 real property to pay the costs for the documents requested herein:

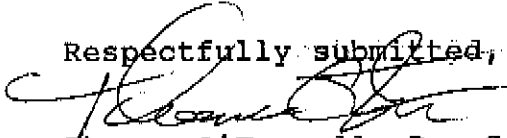
- a) Transcripts of all Court proceedings and Motions entered;
- b) Motions and any written responses to this particular  
 case number;
- c) Orders entered in this cause; and
- d) Any papers filed on behalf and/or against Defendant  
 involving the initial arrest.

3) In accordance with Supreme Court Rules:

The report of the proceedings are hereby requested and held pursuant to Supreme Court Rule 607 of Chapter 110A of the Illinois Compiled Statutes 725 ILCS 5/122-1 of the Post-Conviction Act.

WHEREFORE, Defendant prays that this Honorable Court will grant Defendants Motion and order the Clerk of the Circuit Court, Dorothy Brown to prepare and forward a copy of the above records to Defendant.

Respectfully submitted,

  
Thomas O'Farrell, Pro-Se,  
Defendant-Petitioner

**FILED**

NOV 08 2001

DOROTHY BROWN  
CLERK OF CIRCUIT COURT

STATE OF ILLINOIS )  
 ) ss  
COUNTY OF LIVINGSTON )

PROOF OF SERVICE

I, the undersigned, hereby certify under penalty of perjury and as otherwise provided by law that I have served a copy of the foregoing documents upon the following parties of record by placing same into an envelope with the following names and addresses in plain view:

Dorothy Brown,	State's Attorney for Cook County,
Clerk of the Circuit Court	Richard A. Devine
2650 S. California Ave.	2650 S. California Ave.
Chicago, Illinois 60608	Chicago, Illinois 60608

and placing same into the United States Mail at the Pontiac Correctional Center, Pontiac, Illinois with proper postage to be fully prepaid by the State of Illinois in accordance with the policies and procedures of the Pontiac Correctional Center on this 1 day of November, 2001.

By [Signature]  
Thomas O'Farrell, Pro-Se  
Defendant-Petitioner

**FILED**

NOTICE OF FILING

NOV 08 2001

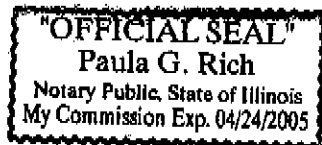
PLEASE TAKE NOTICE, that on the date stated herein, I **DOROTHY BROWN** mailed to Dorothy Brown, Clerk of the Circuit Court of Cook **CLERK OF CIRCUIT COURT** County, Illinois for filing in the case of People v. O'Farrell, Case Number 95 CR 30463 One (1) original and Five (5) copies of the following documents:  
Affidavit of intent to file an Appeal to the Appellate Court of Illinois, First Judicial District; Motion for leave to file and proceed In Forma Pauperis; Motion for appointment of Appellate Panel Counsel or Pro-Bono Counsel; and Motion for transcripts and common law records with One (1) to be stamped filed and returned to me.

Respectfully submitted,

[Signature]  
Thomas O'Farrell, Pro-Se,  
Defendant-Petitioner

Subscribed and Sworn to before me  
on this 12 day of November, 2001.

[Signature]  
Notary Public





1 STATE OF ILLINOIS )  
2 ) SS:  
3 COUNTY OF COOK )

4 IN THE CIRCUIT COURT OF COOK COUNTY  
5 COUNTY DEPARTMENT-CRIMINAL DIVISION

6 THE PEOPLE OF THE )  
7 STATE OF ILLINOIS )  
8 )

9 VS ) Indictment No. 95 30463  
10 ) Charge: Murder  
11 )

12 THOMAS O'FARRELL )

13 REPORT OF PROCEEDINGS

14 BE IT REMEMBERED that on the 5th day of  
15 December A.D., 2001, this cause came on for hearing  
16 before the Honorable MICHAEL P. TOOMIN, Judge of said  
17 court.  
18  
19  
20  
21  
22

23 Brenda D. Hayes, CSR, 084-001226  
24 Official Court Reporter  
2650 S. California  
Chicago, Illinois 60608

1 THE CLERK: Thomas O'Farrell.

2 THE COURT: On October 4th this court  
3 dismissed this petition on the State's motion to  
4 dismiss. He was represented by appointed counsel,  
5 Debbie Gubin, and I don't know that she has done  
6 anything insofar as appeal.

7 He has filed here a motion for leave to  
8 proceed in forma pauperis with somebody other than the  
9 public defender or State Appellate defender.  
10 Apparently he's not happy with either services. He  
11 says he -- He has an affidavit of intent to file an  
12 appeal to the Appellate Court, it was received on  
13 November the 8th. I don't know that a notice of  
14 intent to file an appeal is worth much at all, no  
15 matter when it was filed. He had thirty days to file  
16 the Notice of Appeal, it doesn't appear that he did  
17 that. I think he's going to have to take this up with  
18 the Appellate Court.

19 The court will deny his motion for  
20 transcripts, motion for appointment of appellate  
21 counsel and the motion for transcripts and common law  
22 record all denied. Clerk to notify.

23 (Which were all the proceedings  
24 in the above entitled matter.)

1 STATE OF ILLINOIS)  
2 ) SS:  
COUNTY OF C O O K)

3 IN THE CIRCUIT COURT OF COOK COUNTY  
4 COUNTY DEPARTMENT-CRIMINAL DIVISION

5 I, BRENDA D. HAYES, Official Court  
6 Reporter for the Circuit Court of Cook County, Cook  
7 Judicial Circuit of Illinois, do hereby certify that  
8 I reported stenographically the proceedings had on  
9 the hearing in the above entitled cause; that I  
10 thereafter transcribed said hearing into  
11 typewriting, which I hereby certify to be a  
12 true and accurate transcript of the proceedings  
13 had before the Honorable MICHAEL P. TOOMIN, Judge of  
14 said court.

15  
16  
17  
18  
19   
20 OFFICIAL COURT REPORTER





1 STATE OF ILLINOIS )  
2 ) SS.  
3 COUNTY OF C O O K )

4 IN THE CIRCUIT COURT OF COOK COUNTY  
5 COUNTY DEPARTMENT-CRIMINAL DIVISION

6 THE PEOPLE OF THE )  
7 STATE OF ILLINOIS )  
8 ) Case No. 95-30463  
9 VS )  
10 ) Before JUDGE MICHAEL TOOMIN  
11 THOMAS O'FARRELL )  
12 APRIL 16, 2002

13 Court convened pursuant to adjournment.

14 Present:

15 HONORABLE RICHARD DEVINE,  
16 State's Attorney of Cook County, by  
17 MS. ASHLEY ROMITO,  
18 Assistant State's Attorney,  
19 appeared for the People;

20 MR. EDWIN BURNETTE,  
21 Public Defender of Cook County, by  
22 MS. JULIE KOEHLER,  
23 Assistant Public Defender,  
24 appeared for the defendant.

25 Paul P. Marzano, CSR, RPR  
26 Official Court Reporter  
27 2650 S. California, Room 4C02  
28 Chicago, IL 60608  
29 License #84-001789

EXHIBIT L

L-1

47

1  
2 THE CLERK: Thomas O'Farrell, sheet one. That's  
3 for a motion.

4 THE COURT: Thomas O'Farrell on sheet one has  
5 filed a motion to compel the clerk to file the  
6 defendant's affidavit to file an appeal to the Appellate  
7 Court with the clerk of the Appellate Court.

8 This -- this motion is a classic  
9 example of how a defendant who intends to represent  
10 himself simply does not understand what is occurring and  
11 what the appellate process is about.

12 Apparently, after this Court  
13 dismissed his petition for post conviction relief, he  
14 was notified. He received a copy of that order and then  
15 filed with the Clerk of the Circuit Court an affidavit  
16 of intent to file an appeal.

17 I don't know what that is supposed  
18 to mean. I'm sure that the clerk of this Circuit Court  
19 did not know what they're supposed to mean. And now he  
20 is complaining that the clerk did not transmit that  
21 affidavit of intent to file an appeal to the Appellate  
22 Court. There is no requirement, nor would the clerk in  
23 anyway honor such a request because it is not a notice  
24 of appeal that he filed.

1                   A notice of an appeal, as the law  
2 requires, the Appellate Court would have the case. They  
3 could appoint counsel and none of this correspondence  
4 would be necessary to sort through and find out what  
5 this defendant is complaining about, and the answer in  
6 the packet of material is fairly clear because he wrote  
7 to the Appellate Court. They told him what the facts of  
8 life were. They told him since he did not file a notice  
9 of appeal, there was nothing for Dorothy Brown to submit  
10 to the Appellate Court, and they would not have any  
11 appeal docketed until he did that.

12                   They also pointed out to him in a  
13 lengthy letter of March 7th of this year that if he  
14 wished to appeal, he must file a motion in the Appellate  
15 Court for leave to file a late notice of appeal that  
16 meets the Supreme Court rules of 606C and meets the  
17 requirements. The clear language of March 7th escaped  
18 Mr. O'Farrell because he's still filing things in the  
19 Circuit Court and jurisdiction has long passed in the  
20 Circuit Court.

21                   If he wants to appeal this matter,  
22 he has to follow the directions of the clerk of the  
23 Appellate Court, Mr. Rabid, who pointed out clearly all  
24 of the steps he had to take to perfect his appeal.

1 There is nothing more that this Court can do, and I will  
2 not compel the Clerk of the Circuit Court to do anything  
3 in this case that the defendant is requesting because  
4 there is no requirement nor is there any procedure  
5 available that he is suggesting.

6 So, the motion to compel the Clerk  
7 of the Circuit Court to file his affidavit of intent to  
8 appeal shall be and is hereby denied.

9 (Which were all of the  
10 proceedings had in the  
11 above-entitled cause.)  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24



No.

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County, Illinois.
Respondent-Appellee,	)	
	)	
-vs-	)	No. 95 CR 30463.
	)	
THOMAS O'FARRELL,	)	Honorable
	)	Michael P. Toomin,
Petitioner-Appellant.	)	Judge Presiding.

**PROOF OF SERVICE**

TO: Richard A. Devine	Mr. Thomas O'Farrell
Cook County State's Attorney	Register No. K-54340
300 Daley Center	Pontiac Correctional Center
Chicago, Illinois 60602	P.O. Box 99
	Pontiac, IL 61764

You are hereby notified that on August 24, 2004, we personally delivered the original and three copies of the attached Motion for Leave to File a Late Notice of Appeal and Draft Order to the Clerk of the above Court, a copy of which is hereby served on you.

  
 PATRICIA UNSINN  
 Assistant Deputy Defender

STATE OF ILLINOIS )  
 ) SS  
 COUNTY OF COOK )

The undersigned, being first duly sworn on oath, deposes and says that he personally delivered the required number of copies of the attached Motion to the Clerk of the above Court and to the State's Attorney of Cook County on August 24, 2004.

  
 CLERK

SUBSCRIBED AND SWORN TO BEFORE ME  
 on August 24, 2004.

  
 NOTARY PUBLIC

Official Seal  
 Kathleen Callahan  
 Notary Public State of Illinois  
 My Commission Expires 04/28/06

EXHIBIT M

21

No.

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

---

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County, Illinois.
Respondent-Appellee,	)	
	)	
-vs-	)	No. 95 CR 30463.
	)	
THOMAS O'FARRELL,	)	Honorable
	)	Michael P. Toomin,
Petitioner-Appellant.	)	Judge Presiding.

---

**MOTION FOR LEAVE TO FILE A LATE NOTICE OF APPEAL**

Thomas O'Farrell, Petitioner-Appellant, by Michael J. Pelletier, Deputy Defender, and Patricia Unsinn, Assistant Deputy Defender, Office of the State Appellate Defender, pursuant to Supreme Court Rule 606(c), moves this Court to allow him leave to file a late notice of appeal.

In support of this motion, Patricia Unsinn states:

1. Appellant was convicted of first degree murder and sentenced to a term of 50 years' imprisonment. His conviction was affirmed on appeal under appeal no. 1-97-0911.
2. On April 13, 2001, appellant filed a *pro se* petition for post-conviction relief. The court appointed counsel but ultimately dismissed the petition on the State's motion on October 4, 2001.
3. On November 1, 2001, appellant, who remains incarcerated, mailed to the circuit court clerk four documents: an Affidavit of Intent to File an Appeal to the Appellate Court of Illinois, First Judicial District, a Motion for Leave to File and Proceed In Forma Pauperis, a

Motion for Appointment of Appellate Panel Counsel or Pro-Bono Counsel, and a Motion for Transcripts and Common Law Records. See attached documents.

4. On December 5, 2001 the Honorable Michael P. Toomin denied the motions. See attached order. With respect to the affidavit of intent to file an appeal, Judge Toomin stated, "I don't know that a notice of intent to file an appeal is worth much at all, no matter when it was filed." See attached transcript.

5. On December 9, 2001, the circuit court clerk returned appellant's documents to him without file stamping them.

6. Appellant continued to make efforts to have his notice of intent filed and processed as a notice of appeal, but was unsuccessful.

7. These events came to the attention of the State Appellate Defender after appellant filed a successive petition which was also dismissed by the circuit court and which is currently being appealed under appellate number 1-03-3404. The State Appellate Defender represents appellant in that appeal.

8. Upon review of the record in that appeal, appellate counsel concluded that appellant had indicated in a timely manner his desire to appeal from the dismissal of his original post-conviction petition, that he was indigent, and that he needed counsel to assist him. Although appellant entitled the document an "Affidavit of Intent to File and Appeal to the Appellate Court of Illinois, First Judicial District," the circuit court could and should have treated it as a notice of appeal as it was timely filed, indicated a desire to appeal, and identified the final judgment from which appellant wanted to appeal. Any defects in the document were ones of form, rather than substance, which would have caused no prejudice to the State, and therefore, should have been overlooked, as a notice of appeal is to be liberally construed. *People v.*

23

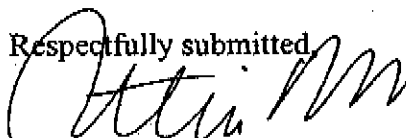


*Hansen*, 198 Ill. App. 3d 160, 555 N.E.2d 797 (4th Dist. 1990); *People v. Gallagher*, 191 Ill. App. 3d 488, 548 N.E.2d 78 (4th Dist. 1989). Especially when considered in the context of the accompanying documents, appellant identified the date of the order from which he wanted to appeal, the court to which the appeal would be taken, the nature of the order, and the fact that he was indigent, and without counsel, and wanted counsel appointed, satisfying the requisites of a notice of appeal. Supreme Court Rule 606(d). If the court did not want to treat appellant's affidavit and accompanying documents as a notice of appeal, since appellant indicated a desire to appeal, the court should have directed the clerk of the circuit court to file a notice of appeal on his behalf. *People v. Sanders*, 40 Ill. 2d <sup>458</sup>~~485~~, 240 N.E.2d 627 (1968); Supreme Court Rules 606(a) and 651(d). At the very least, being informed of appellant's desire to appeal and that he was indigent and required counsel to represent him for purposes of appeal, the court should have appointed counsel who would have had the responsibility of filing a notice of appeal on his behalf. *Roe v. Flores-Ortega*, 526 U.S. 1069 (2000).

9. Because of these circumstances, the failure of the clerk to file a notice of appeal was not due to appellant's culpable negligence. Additionally, there is merit to his appeal.

WHEREFORE, appellant respectfully requests that this Honorable Court allow him leave to file a late notice of appeal.

Respectfully submitted,



PATRICIA UNSINN

Assistant Deputy Defender  
Office of the State Appellate Defender  
203 North LaSalle Street - 24th Floor  
Chicago, Illinois 60601  
(312) 814-5472

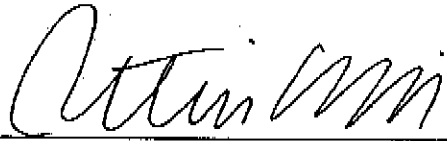
COUNSEL FOR PETITIONER-APPELLANT

24

STATE OF ILLINOIS )  
 ) SS  
COUNTY OF COOK )

**AFFIDAVIT**

Patricia Unsinn, being first duly sworn on oath, deposes and says that she has read the foregoing Motion by her subscribed and the facts stated therein are true and correct to the best of her knowledge and belief.



PATRICIA UNSINN  
Assistant Deputy Defender

SUBSCRIBED AND SWORN TO BEFORE ME  
on August 24, 2004.

  
NOTARY PUBLIC

25



04-2481

IN THE

## APPELLATE COURT OF ILLINOIS

## FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County, Illinois.
Respondent-Appellee,	)	
	)	
-vs-	)	No. 95 CR 30463.
	)	
THOMAS O'FARRELL,	)	Honorable
	)	Michael P. Toomin,
Petitioner-Appellant.	)	Judge Presiding.

## ORDER

This matter coming to be heard on Motion for Leave to File a Late the Notice of Appeal, all parties having been duly notified, and the Court being advised in the premises,

IT IS HEREBY ORDERED:

That the motion for leave to file a late notice of appeal is allowed ~~and~~.

The Office of the State Appellate Defender, having already been appointed to represent defendant on appeal number 1-03-3404, is appointed to represent defendant on appeal. Allowed/denied.

  
PRESIDING JUSTICE

\_\_\_\_\_  
JUSTICE

\_\_\_\_\_  
JUSTICE

ORDER ENTERED

SEP 07 2004

APPELLATE COURT, FIRST DISTRICT

DATE: \_\_\_\_\_

PATRICIA UNSINN

Assistant Deputy Defender

Office of the State Appellate Defender

203 North LaSalle Street - 24th Floor

Chicago, Illinois 60601

(312) 814-5472

COUNSEL FOR PETITIONER-APPELLANT

EXHIBIT N

20



SECOND DIVISION  
August 30, 2005NOTICE

The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

No. 1-04-2481

IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

05-815

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 95 CR 30463
	)	
THOMAS O'FARRELL,	)	Honorable
	)	Michael P. Toomin,
Defendant-Appellant.	)	Judge Presiding.

ORDER

Defendant Thomas O'Farrell appeals from an order of the circuit court denying his pro se motion for substitution of judge at the proceedings on his first postconviction petition. On appeal, defendant contends that the trial court's denial of his motion for substitution of judge was based on its misapprehension of crucial facts. We affirm.

Following a bench trial, defendant was convicted of first degree murder and sentenced to 50 years' imprisonment. On direct appeal, this court affirmed defendant's conviction and sentence and modified the mittimus to allow defendant one day of good conduct credit for each day of his sentence served. People v.

1-04-2481

O'Farrell, No. 1-97-0911 (1999) (unpublished order under Supreme Court Rule 23).

On January 26, 2000, defendant filed a *pro se* postconviction petition, alleging, in relevant part, that his counsel was ineffective in failing to present evidence of judicial misconduct in a posttrial motion. Defendant asserted that his counsel should have alleged that prior to the start of his trial the trial court's deputy, Michael Stawczek, Sr., told defendant that "Judge Toomin (trial court) is going to find you guilty and give you fifty (50) years." Defendant attached affidavits from himself and his father. Defendant's father attested that defendant informed him that the court's "Deputy \*\*\* told [defendant] that he was going to be found guilty and sentenced to fifty (50) years." Defendant attested that the "Deputy \*\*\* told [him] in the elevator, prior to trial, that, 'Judge Toomin [was] going to find [him] guilty and give [defendant] fifty (50) years.'" "

On the same date defendant filed his petition, he also filed a *pro se* "motion for different judge to consider," alleging that the trial judge would be biased against him in deciding his postconviction petition because he mentioned the trial judge in his petition when he discussed judicial misconduct. Defendant also alleged that

"[t]he Trial Court prior to the Defendant['s] trial in this cause had determined Defendant['s] guilt and

1-04-2481

sentence prior to any evidence be[ing] offered therefore Defendant was prejudiced by Trial Court['s] bias[ed] action."

On February 15, 2000, the court denied the motion for substitution of judge,<sup>1</sup> noting that

"[i]t is not supported by affidavit pursuant to the statute. \*\*\* [Defendant] mentions that the judge is under judicial misconduct and, therefore, the judge would be biased against him. There is no such allegation in his petition. And he also alleges that since the trial court also found the Defendant guilty and sentenced him, therefore, he would be prejudiced. The Defendant's motion does not rise to a level of allegations to substitute [the trial judge] for cause. It is unsupported pursuant to the statute."

Subsequently, appointed counsel amended defendant's postconviction petition, and the State filed a motion to dismiss, which the trial court granted on October 4, 2001. In May 2003, defendant filed a successive pro se petition for relief and another motion for substitution of judge. In July 2003, the successive petition and the motion for substitution of judge were

---

<sup>1</sup>It appears that defendant appealed the denial of his motion for substitution of judge but then moved to dismiss it on his own motion, which this court allowed. People v. O'Farrell, No. 1-00-0968 (2001) (dispositional order).



1-04-2481

both denied.<sup>2</sup>

This court allowed defendant to file a late notice of appeal of the order dismissing his first postconviction petition on October 4, 2001.

On appeal, defendant contends that the court erred in denying his motion for substitution of judge in February 2000.

As an initial matter, defendant's failure to indicate that he was appealing the denial of his motion for substitution of judge in his notice of appeal does not result in this court's loss of jurisdiction over that order because such an order was a step in the procedural progression leading to the order mentioned in the notice of appeal. See Jiffy Lube International v. Agarwal, 277 Ill. App. 3d 722, 727 (1996).

We next note that defendant contends the standard of review is *de novo* because the trial court allegedly failed to consider crucial evidence in denying his motion for substitution. The standard for reviewing the trial court's denial of defendant's motion for substitution of judge is abuse of discretion. See People v. Meeks, 249 Ill. App. 3d 152, 160 (1993). Furthermore, we review the trial court's judgment, not its reasons for the judgment. People v. Lee, 344 Ill. App. 3d 851, 853 (2003).

---

<sup>2</sup>Twice defendant appealed the dismissal of his successive postconviction petition, but then moved to dismiss it. This court allowed both dismissals. People v. O'Farrell, Nos. 1-03-2619 and 1-03-3404 (2004) (dispositional orders). Defendant then filed another appeal, and defendant's appellate counsel moved to withdraw. That appeal is still pending. People v. O'Farrell, No. 1-04-1094 (appeal pending).

1-04-2481

Accordingly, we may affirm a trial court's judgment on any basis supported by the record regardless of its reasons for reaching its decision. In re Marriage of Loomis, 348 Ill. App. 3d 972, 974 (2004). We now turn to the issue on appeal.

Our supreme court has held that there is no absolute right to substitution of a judge at a postconviction proceeding. People v. Enis, 194 Ill. 2d 361, 416 (2000). The defendant must show that he will be substantially prejudiced if the motion for substitution is denied. Enis, 194 Ill. 2d at 416. A defendant alleging prejudice must support such an allegation with an affidavit. People v. Brim, 241 Ill. App. 3d 245, 248-49 (1993). A mere conclusory statement, even if made under oath, is insufficient to establish the violation of any constitutional right. People v. Coleman, 32 Ill. App. 3d 949, 952 (1975). A trial judge who, prior to hearing any evidence, "expresses" the opinion that the defendant is guilty may be disqualified. (Emphasis added.) People v. Williams, 272 Ill. App. 3d 868, 874-75 (1995).

In the present case, contrary to defendant's contention, there are no affidavits attached to the motion for substitution of judge. Defendant, however, is apparently asserting that the affidavits attached to his first postconviction petition were also intended to support his motion for substitution where the motion and petition were filed on the same date. Defendant's motion for substitution of judge and his petition for

1-04-2481

postconviction relief were two separate pleadings. Defendant was required to attach to the motion for substitution an affidavit supporting his allegations of prejudice. See Brim, 241 Ill. App. 3d at 248-49. Furthermore, even considering defendant's motion with the affidavits attached to defendant's first postconviction petition, we find that the trial court did not abuse its discretion in denying the motion for substitution.

Defendant alleged in his petition that the court was prejudiced against him because it decided his case prior to hearing any evidence. Defendant attested in his affidavit that prior to the start of his trial the court's deputy informed him that the judge was going to find him guilty and sentence him to 50 years in prison. The affidavit of defendant's father indicated that defendant informed him that prior to trial the deputy told him he was going to be found guilty and imprisoned for 50 years. These affidavits only attest to the deputy's statements but do not indicate that the judge expressed to the deputy that he was going to find defendant guilty and impose a 50-year sentence. See Williams, 272 Ill. App. 3d at 874-75. Defendant's allegation in his motion that the judge had found him guilty prior to trial was merely a conclusory allegation that did not mandate substitution. See Coleman, 32 Ill. App. 3d at 951-52 (motion for substitution properly denied where the motion alleged that the defendant's trial judge was party to an improper conversation with a fellow prisoner, but the attached affidavit

1-04-2481

failed to attest to an actual conversation between the judge and the prisoner). Moreover, in the absence of an affidavit from the deputy, Michael Stawczek, Sr., the person who allegedly told defendant that the judge was going to find him guilty, substitution was not required because the allegation was not "substantially borne out" by matters evidenced in the record. See Coleman, 32 Ill. App. 3d at 952.

In addition, the fact that defendant alleged judicial misconduct in his postconviction petition cannot be used as a basis to obtain substitution of his trial judge. See generally In re Marriage of Hartian, 222 Ill. App. 3d 566, 569 (1991) (the respondent failed to show prejudice by the trial judge where he filed a complaint against the judge with the Judicial Inquiry Board); People v. House, 202 Ill. App. 3d 893, 899-900, 909-10 (1990) (substitution not required where the defendant complained of the trial judge's rulings in his postconviction petition). Furthermore, a judge is presumed to be impartial even after extreme provocation. People v. Jackson, 205 Ill. 2d 247, 276 (2001); People v. Steidl, 177 Ill. 2d 239, 265 (1997). Moreover, if we were to conclude that an allegation of judicial misconduct in a postconviction petition would require recusal, then defendants would simply allege misconduct on their trial judge's part for the purpose of obtaining another judge. See generally People v. Smeathers, 297 Ill. App. 3d 711, 716 (1998) (filing a complaint against one's trial judge does not require substitution

1-04-2481

because to hold otherwise would allow defendants to obtain a new judge by filing frivolous complaints "to force an endless stream of recusals"). Accordingly, we find that the trial court did not abuse its discretion in denying defendant's motion for substitution.

For the reasons stated, we affirm the circuit court's judgment.

Affirmed.

BURKE, P.J., with WOLFSON and GARCIA, JJ., concurring.



101468

NO. \_\_\_\_\_

IN THE SUPREME COURT OF ILLINOIS

People State of Illinois,

Respondent

v.

Thomas O'Farrell,

Petitioner

) Appellate Court,  
) First District  
) No. 1-04-2481  
)  
) Circuit Court,  
) Cook County  
) No. 95 CR 30463  
)  
) Hon. Michael P. Toomin,  
) Judge Presiding.

PETITION FOR LEAVE TO APPEAL

**FILED**

OCT 20 2005

**SUPREME COURT CLERK**

35-100405  
70-110805  
R-083005  
No RH

Thomas O'Farrell  
Reg. No. K-54340  
P. O. Box 99  
Pontiac, Illinois 61764

EXHIBIT P

Signum

---

IN THE  
SUPREME COURT OF ILLINOIS

---

People of the State of Illinois,	)	Appeal from the Circuit
	)	Court of Cook County
Plaintiff/Appellee,	)	Illinois.
	)	
vs.	)	No. 95 CR 30463
	)	
Thomas O'Farrell,	)	Honorable
	)	Michael P. Toomin,
Defendant/Appellant.	)	Judge Presiding.

---

PETITION FOR LEAVE TO APPEAL

1.

PRAYER FOR LEAVE TO APPEAL

Your Petitioner, Thomas O'Farrell, pro se, respectfully petitions this Honorable Court for Leave to Appeal pursuant to Supreme Court Rule 315, from the judgment of the Illinois Appellate Court, First Judicial District, which affirmed the summary dismissal of his pro se Petition for Post Conviction Relief by the Circuit Court of Cook County.

2.

OPINION AND PROCEEDINGS BELOW

On January 26, 2000, Petitioner filed a pro se Petition for Post Conviction Relief and a pro se Motion for Substitution of Judge. On October 4, 2001, the Court granted the State's motion to dismiss the petition. Petitioner filed a timely notice of appeal. On March 7, 2005, appointed counsel filed a Brief and Argument, challenging only the denial of the motion for substitution of judge. On June 9, 2005, Petitioner filed a Motion for Leave to File a Supplemental Brief before the Appellate Court. In said Brief, Petitioner challenged the trial court's summary



dismissal of the petition. On June 15, 2005, the Appellate Court denied Petitioner leave to file the supplemental brief. On August 30, 2005, the Appellate Court affirmed the denial of the motion for substitution of judge. This appeal follows.

3.

POINTS RELIED UPON FOR REVERSAL

1. Whether the Appellate Court erred in affirming the denial of Petitioner's pro se Motion for Substitution of Judge, where in doing so, the Court created an impossible burden of proof for a pro se movant to satisfy?

2. Whether the Appellate Court erred in denying Appellant leave to file his Supplemental Brief and Argument, where Appellate Counsel failed to brief any of the issues contained in his post conviction petition.

4.

STATEMENT OF FACTS

On January 26, 2000, Petitioner filed a pro se post conviction petition and a pro se motion for substitution of judge. In his petition, Petitioner raised various claims of ineffective assistance of trial counsel. In one such claim, Petitioner argued that his trial counsel was ineffective because he failed to include in his post-trial motion that the bailiff, Michael Stawczek told Petitioner on the morning of his trial that Judge Toomin was going to find him guilty and sentence him to a term of fifty (50) years. In support of this contention, Petitioner attached his own affidavit and the affidavit of his father, a retired Alsip Police Lieutenant, who stated that Petitioner called him and informed him of what the bailiff had said. In his motion, Petitioner stated that he

believed Judge Toomin would be biased against him because he had determined his guilt and sentence prior to any evidence being presented at his trial, and because he raised this claim of judicial misconduct in his petition.

On February 15, 2000, Judge McSweeney-Moore heard and denied Petitioner's motion, finding that his claim that Judge Toomin would be prejudiced against him because he "found [him] guilty and sentenced him," did not rise to the level of an allegation sufficient to substitute Judge Toomin for cause, the motion was not supported by affidavit as required under the statute, and Petitioner did not raise a claim of judicial misconduct in his petition.

Private counsel was appointed to represent Petitioner, and on April 13, 2001, filed an amended post conviction petition in place of his pro se petition. In this petition, counsel maintained that the trial court erred because it failed to ensure that all Brady material relating to Thomas Dye, a jailhouse informant who testified against Petitioner at his sentencing hearing, was tendered to the defense, and failed to take judicial notice of the applicable law concerning the probate of minor's estates. Counsel additionally maintained that trial counsel was ineffective for failing to properly present the motion to quash arrest and suppress physical evidence; file pre-trial motion requesting the court to reconsider it's denial of these motions; call witnesses to introduce the mental state of of the defendant and victim in order to support a second degree murder finding; cross-examine Dye concerning the legal papers stolen from Petitioner; utilize the probate statutes, introduce certified copies of of the final

accounting of the victim's estate, and the testimony of the estate administrator; request that the court reconsider the motion for additional discovery; and present additional mitigating evidence concerning the victim's medical and mental conditions. Counsel further contended that appellate counsel was ineffective for failing to raise claims concerning trial counsel's ineffectiveness at trial and sentencing, the denial of the motion for additional discovery, as well as the motions to quash arrest and suppress physical evidence, and the prosecutor's misconduct for presenting Dye's testimony and failing to tender all information concerning Dye's involvement as an informant for the State. In support of this petition, counsel attached affidavits from Petitioner's parents and probate documents from the victim's estate. On May 8, 2001, an amendment to the amended petition was filed, which alleged that trial counsel was ineffective because he prevented Petitioner from raising his excessive sentence claim at trial or on direct appeal.

On May 30, 2001, the State filed a motion to dismiss the amended petition. In this motion, the State argued that the issues raised did not state constitutional questions that were cognizable under the Post Conviction Hearing Act, and that those that did were barred by the doctrines of waiver and res judicata or have been held by Illinois courts to be insufficient to warrant a hearing. On June 28, 2001, counsel filed a response to the State's motion, and on August 22, 2001, a hearing on the State's motion was held.

On October 4, 2001, the circuit court granted the State's motion to dismiss, finding that Petitioner's claims that his trial

counsel was ineffective, that the court erroneously allowed Dye to testify, and that his sentence was excessive were barred by the doctrines of waiver and res judicata and Petitioner failed to make a substantial showing that his constitutional rights were violated either at trial or on direct review.

Petitioner's motion for leave to file late notice of appeal was allowed by the Appellate Court on September 7, 2004, and appellate counsel was appointed. On appeal, counsel briefed one issue for consideration by the Court: whether the trial court erred in denying Petitioner's pro se motion for substitution of judge. On June 9, 2005, Petitioner filed a motion for leave to file a supplemental brief before the Appellate Court. The Appellate Court denied Petitioner leave to file the supplemental brief, and on August 30, 2005, the Court affirmed the trial court's denial of the motion for substitution of judge.

##### 5.

##### ARGUMENTS

1. THE APPELLATE COURT ERRED IN AFFIRMING THE DENIAL OF PETITIONER'S PRO SE MOTION FOR SUBSTITUTION OF JUDGE, WHERE IN DOING SO, THE COURT CREATED AN IMPOSSIBLE BURDEN OF PROOF FOR A PRO SE MOVANT TO SATISFY.

Petitioner filed a pro se motion for substitution of judge at the same time he filed his post conviction petition. In denying the motion, the court reasoned that Petitioner's claim that the judge would be prejudiced against him because he "found [him] guilty and sentenced him," did not rise to the level of an allegation sufficient to substitute the judge for cause, Petitioner failed to raise a claim of judicial misconduct in his post conviction petition, and the motion was not supported by an affidavit. However, the record shows that the court's

recollection of these facts was in error. Petitioner did not claim that the judge would be biased against him because he found him guilty and sentenced him, but rather because he had determined his guilt and sentence prior to any evidence being presented at his trial. In addition, Petitioner raised a claim of judicial misconduct in his post conviction petition and supported this claim by attaching two affidavits, all of which were filed with his motion for substitution of judge. Thus, where the trial court's denial of Petitioner's motion was based upon it's inaccurate recollection of the facts, the Appellate Court should have reversed the ruling, and remanded the cause for a hearing.

In it's order affirming the denial of Petitioner's motion, the Appellate Court stated that Petitioner's affidavit and the affidavit of his father, were insufficient to establish bias on the part of the trial judge. The Court reasoned that, because Petitioner was relying on a statement made by bailiff Michael Stawczek, the motion needed to be accompanied by an affidavit from Stawczek to have any viability. This Court should grant leave to appeal to determine whether the Appellate Court created an impossible standard for a pro se litigant to meet, when filing a motion for substitution of judge.

First, the Court erred in determining that Petitioner needed the affidavit of Stawczek in order to prevail on his motion for substitution of judge. Primarily, because an affidavit from Stawczek would be impossible for Petitioner to obtain. It would have been more appropriate for the trial court to hold a hearing, calling Stawczek as a witness, given the fact that Petitioner's affidavit alone was sufficient to establish a prima facie case of impartiality on the part of the trial judge. People v.

Williams, 272 Ill.App.3d 868, 651 N.E.2d 532 (1st Dist. 1995); People v. Robinson, 18 Ill.App.3d 804, 310 N.E.2d 652 (1st Dist. 1974). In creating this heightened standard of review, the Court made it virtually impossible for a pro se litigant to ever succeed on the merits of a motion for substitution of judge.

2. THE APPELLATE COURT ERRED IN DENYING APPELLANT LEAVE TO FILE HIS SUPPLEMENTAL BRIEF AND ARGUMENT, WHERE APPELLATE COUNSEL FAILED TO BRIEF ANY OF THE ISSUES CONTAINED IN HIS POST CONVICTION PETITION.

This Court should grant leave to appeal in the instant case to determine whether the hybrid representation rule prevents criminal defendants who are represented by counsel on appeal, from filing pro se pleadings in the Appellate Court, where no Sixth Amendment right to effective representation exists.

In the case at bar, appellate counsel only briefed one issue for consideration by the Court: whether the trial court erred in denying Petitioner's pro se motion for substitution of judge. Counsel failed to raise any of the issues contained in Petitioner's pro se or amended post conviction petitions.

In his supplemental brief, Petitioner raised five (5) issues for consideration by the Court: (1) whether he was denied the effective assistance of counsel, in violation of the Sixth Amendment to the U.S. Constitution, where trial counsel failed to present additional evidence during the suppression hearing to prove his confession was illegally obtained; (2) whether he was denied the effective assistance of counsel where trial counsel failed to present evidence at sentencing of prosecutorial misconduct; (3) whether he was denied effective assistance of counsel where trial counsel failed to raise in his post trial

motion and present evidence that the trial court engaged in judicial misconduct; (4) whether he was denied effective assistance of counsel where trial counsel failed to introduce evidence of his and the victim's mental states in order to support a finding of second degree murder; and (5) whether he was denied the effective assistance of counsel where trial counsel used false promises of a thirty (30) year sentence in order to secure his acquiescence in a jury waiver. See Exhibit A. On June 15, 2005, the Appellate Court denied Petitioner leave to file the supplemental brief.

In People v. Handy, 278 Ill.App.3d 829, 664 N.E.2d 1042 (1996), the Court held that a pro se motion filed by a defendant in a criminal case while he is represented by counsel is "not properly before the court." In Handy, the Court wrote:

"[A trial court has] no responsibility to entertain [a] defendant's pro se motions during the time he was represented by counsel \* \* \* A defendant when represented by competent counsel, must not be permitted to proceed unfettered, to file a stream of pro se motions \* \* \*

[A] defendant is not entitled to a 'hybrid trial' where he alternates between proceeding pro se and being represented by counsel."

In People v. Neal, 286 Ill.App.3d 353, 675 N.E.2d 130 (1996), the Court held that a pro se motion to reduce sentence filed while defendant was represented by appellate counsel was not properly before the trial court. In so holding, the Court wrote:

"[D]efendant had the benefit of trial counsel who did not deem the filing of a motion to reduce sentence to be appropriate. The defendant had the benefit of the original appeal upon all of the issues the OSAD chose to raise. Moreover, we note that the OSAD, on this appeal, rejected the grounds set forth in defendant's pro se motion."

Although Handy and Neal addressed matters at the trial level,

People v. Woods, 292 Ill.App.3d 172, 684 N.E.2d 1053 (1997), extended their holdings to encompass criminal cases at the appellate level.

Petitioner contends that the failure of the Appellate Court to allow him leave to file his supplemental brief denied him an adequate appellate review. Here, Petitioner had no Sixth Amendment right to the effective assistance of appellate counsel. Therefore, he is not permitted to raise an ineffective assistance of counsel claim against appellate counsel for her failure to brief the issues contained in his post conviction petition. If counsel chose not to raise the issues, then Petitioner would be denied appellate review of those issues, with no legal recourse.

Furthermore, the failure of counsel to brief the issues would be attributable to Petitioner for the purposes of filing a federal Petition for Writ of Habeas Corpus. Petitioner would then be forced to satisfy the cause and prejudice test, to determine whether the federal courts would allow him to proceed with the unexhausted issues. However, Petitioner would be unable to meet the federal standard, as he had no Sixth Amendment right to effective assistance of counsel, and only "constitutionally" ineffective assistance constitutes cause for a procedural default. See Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639 (1986).

Thus, because any harm accrued from an appellate attorney's decision not to raise an issue on appeal, when there is no Sixth Amendment right to counsel, will be attributed to a criminal defendant, the "hybrid representation" rule should not apply in those instances.

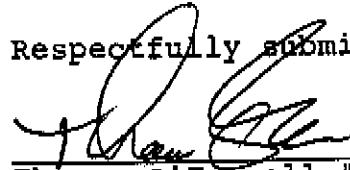


6.

CONCLUSION

Based on the foregoing arguments, Petitioner prays that this Honorable Court will grant him leave to appeal to address the questions presented herein.

Respectfully submitted,



Thomas O'Farrell #K54340  
P.O. Box 99  
Pontiac, Illinois 61764



The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

FIRST DIVISION  
Filed: 05/21/07

No. 1-04-2481

IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 95 CR 30463
	)	
THOMAS O'FARRELL,	)	Honorable
	)	Michael P. Toomin,
Defendant-Appellant.	)	Judge Presiding.

O R D E R

Defendant Thomas O'Farrell appeals from an order of the trial court granting the State's motion to dismiss his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 et seq. (West 2002)) without an evidentiary hearing. On appeal, defendant contends that the trial court erred in denying his *pro se* motion for substitution of judge at the proceedings on his postconviction petition. In a *pro se* supplemental brief, defendant also contends that (1) the trial court erred in dismissing the petition without a hearing to determine whether defendant had received ineffective assistance of trial counsel; and (2) his postconviction counsel failed to comply with Illinois Supreme Court Rule 651(c) (134 Ill. 2d R. 651(c)). We affirm.

Following a bench trial, defendant was convicted of first degree murder for the shooting death of his wife, and sentenced

EXHIBIT Q

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to 50 years in prison. On direct appeal, this court affirmed defendant's conviction and sentence, but modified the mittimus to reflect that defendant was to receive one day of good conduct credit for each day in prison. People v. O'Farrell, No. 1-97-0911 (1999) (unpublished order under Supreme Court Rule 23). The facts of the offense are fully set out in our order on direct appeal; we restate here only those facts necessary to an understanding of defendant's current appeal.

Prior to trial, defendant filed a motion to suppress statements allegedly made by him to inmate Thomas Dye. The court denied the motion.

Evidence at trial showed that at around 4 a.m. on September 28, 1995, defendant killed his wife, Lesley O'Farrell, by shooting her once in the head and once in the chest while she was sleeping, and then shot himself in the shoulder. Initially, defendant told responding police officers that he awoke to the sound of a gunshot and saw a 6 foot, 3 inch, 200-pound African American man shoot his wife. He then struggled with the home invader and was shot in the ensuing scuffle. Later, however, defendant told police officers that he shot his wife pursuant to her request. Specifically, defendant told officers that, because his wife suffered from many physical ailments and no longer wished to live, she devised a plan whereby he would kill her

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while she slept. The court found defendant guilty of first degree murder.

A capital sentencing hearing was held, after which the court determined defendant was not eligible for the death penalty. Prior to sentencing, defendant filed a motion for a new trial alleging, *inter alia*, that the court erred in denying his pretrial motion to suppress statements made to Dye. After hearing arguments, the court denied the motion.

At sentencing, Dye testified over defendant's renewed objection that he shared a jail cell with defendant in November and December 1995. During that time, he and defendant often spoke about defendant's crime. According to Dye, defendant married the victim and eventually killed her to gain access to her family's money. Specifically, defendant and the victim had a son, Leroi, who was to inherit the victim's money in the event of her death. Defendant believed that, at worst, the court would find him guilty of second degree murder because (1) his father was a police officer; (2) the victim was so ill that it would be considered a mercy killing; (3) he had no criminal background; and (4) he was "clean-cut." Dye testified that defendant believed if he was convicted of second degree murder, he would be out of prison before his son turned 18, and "would control the inheritance based on his son being a minor." Dye testified that defendant never expressed remorse for killing his wife.

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On cross-examination, Dye admitted that he had access to defendant's property because he shared a jail cell with defendant. He also admitted that he had previously been incarcerated for theft crimes in which he "worked [his] way into somebody's confidence and got into their apartments and stole from them." Dye admitted that he had 14 felony convictions at the time of this trial, was testifying in connection with a plea agreement, and that he had testified for the State in previous unrelated cases.

Clinical psychologist Dr. Larry Heinrich testified as an expert in forensic psychology. He testified that he met with defendant and examined the reports of another physician, Dr. Robbins, who had treated both defendant and the victim. Based on those reports, Dr. Heinrich believed that, at the time of the shooting, defendant suffered depression exacerbated by the stress of both his marriage and the victim's depression. Based on Dr. Robbins' reports and the victim's diary, Dr. Heinrich believed the victim had "passive suicidal ideation." On cross-examination, Dr. Heinrich admitted that he had not spoken with Dr. Robbins about the victim or defendant.

Defendant's brother and brother-in-law both testified that defendant was a caring father to his son.

The court sentenced defendant to 50 years in prison. Defendant's conviction was affirmed on appeal. People v.

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O'Farrell, No. 1-97-0911 (1999) (unpublished order under Supreme Court Rule 23).

In January 2000, defendant filed a *pro se* postconviction petition which was later amended by postconviction counsel. The initial *pro se* petition alleged, in relevant part, that trial counsel was ineffective for failing to present evidence of judicial misconduct in a post-trial motion. Defendant attached his own affidavit and that of his father. Defendant attested that the "Deputy \*\*\* told [him] in the elevator, prior to trial, that, '[the trial judge was] going to find [him] guilty and give [defendant] fifty (50) years.'" Defendant's father attested that defendant informed him that the court's "Deputy \*\*\* told [defendant] that he was going to be found guilty and sentenced to fifty (50) years."

On the same date that defendant filed his petition, he also filed a *pro se* "motion for different judge to consider" (motion for substitution), alleging that the trial judge would be biased against him in deciding his postconviction petition because he mentioned the trial judge in his petition when he discussed judicial misconduct. Defendant also alleged that he was prejudiced by the trial court's bias because the trial court had predetermined his guilt.

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On February 15, 2000, the court denied the motion for substitution,<sup>1</sup> noting that

"[i]t is not supported by affidavit pursuant to the statute. \*\*\* [Defendant] mentions that the judge is under judicial misconduct and, therefore, the judge would be biased against him. There is no such allegation in his petition. And he also alleges that since the trial court also found the Defendant guilty and sentenced him, therefore, he would be prejudiced. The Defendant's motion does not rise to a level of allegations to substitute [the trial judge] for cause. It is unsupported pursuant to the statute."

Subsequently, appointed counsel amended defendant's postconviction petition without adopting defendant's *pro se* postconviction petition. This amended petition is the subject of this appeal. The State filed a motion to dismiss, which the trial court granted on October 4, 2001.<sup>2</sup> The amended

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<sup>1</sup>It appears that defendant appealed the denial of his motion for substitution of judge, but then moved to dismiss it on his own motion, which this court allowed. People v. O'Farrell, No. 1-00-0968 (2001) (dispositional order).

<sup>2</sup>While defendant's first postconviction petition was pending in the circuit court, defendant filed an appeal, which he subsequently moved to dismiss. This court allowed the dismissal. People v. O'Farrell, No. 1-00-0968 (2001) (dispositional order).



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postconviction petition contained the following claims: (1) defendant was denied the effective assistance of trial counsel where counsel's performance at the suppression hearing, trial, and sentencing hearing was inadequate; (2) defendant was denied the effective assistance of appellate counsel where counsel failed to raise certain issues on appeal; and (3) the trial court erred in allowing State's witness Dye to testify without ensuring that defendant was tendered all pertinent information and by failing to take judicial notice of "applicable statutes concerning the Probate of Minor Estates laws in Illinois." Defendant's counsel then filed an "amendment to amended post conviction petition" which added a fourth claim, that defendant's sentence was excessive. Attached to this document is defendant's affidavit, in which he attests, *inter alia*,

"4. I have reviewed the Amended Post Conviction Petition and the Amendment to the Post Conviction Petition;

5. All factual allegations are true to the best of my knowledge."

In May 2003, defendant filed a second *pro se* petition for relief and another motion for substitution of judge. In July

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2003, the second petition and the motion for substitution of judge were both denied.<sup>3</sup>

On appeal, defendant first contends that the court erred in denying his motion for substitution of judge in February 2000. Specifically, defendant asserts that the court made reversible error when it based its decision on the incorrect belief that (1) defendant's argument was that the trial court would be biased because it had previously found him guilty; (2) defendant did not raise the issue of judicial misconduct in his petition; and (3) the petition was not supported by the necessary affidavit. We disagree.

As an initial matter, defendant's failure to indicate that he was appealing the denial of his motion for substitution of judge in his notice of appeal does not result in this court's loss of jurisdiction over that order because such an order was a step in the procedural progression leading to the order mentioned in the notice of appeal. See Jiffy Lube International v. Agarwal, 277 Ill. App. 3d 722, 727 (1996).

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<sup>3</sup>Twice defendant appealed the dismissal of his second postconviction petition, but then moved to dismiss it. This court allowed both dismissals. People v. O'Farrell, Nos. 1-03-2619 and 1-03-3404 (2004) (dispositional orders). Defendant then filed a third postconviction petition, which the circuit court dismissed. Defendant appealed the dismissal, and defendant's appellate counsel moved to withdraw pursuant to Pennsylvania v. Finley, 481 U.S. 551, 95 L. Ed. 2d 539, 107 S. Ct. 1990 (1987). This court allowed the withdrawal and affirmed the judgment. People v. O'Farrell, No. 1-04-1094 (2005) (unpublished order pursuant to Supreme Court Rule 23).

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We next note that defendant incorrectly asserts that the standard of review is de novo because the trial court allegedly failed to consider crucial evidence in denying his motion for substitution. The standard for reviewing the trial court's denial of defendant's motion for substitution of judge is abuse of discretion. See People v. Meeks, 249 Ill. App. 3d 152, 160 (1993). Furthermore, we review the trial court's judgment, not its reasons for the judgment. People v. Lee, 344 Ill. App. 3d 851, 853 (2003). Accordingly, we may affirm a trial court's judgment on any basis supported by the record, regardless of its reasons for reaching the decision. Lee, 344 Ill. App. 3d at 853. We now turn to the issue on appeal.

There is no absolute right to substitution of a judge at a postconviction proceeding. People v. Enis, 194 Ill. 2d 361, 416 (2000). Rather, defendant must show that he will be substantially prejudiced if the motion is denied. Enis, 194 Ill. 2d at 416. A defendant seeking substitution of judge for alleged prejudice must support such an allegation with an affidavit. People v. Brim, 241 Ill. App. 3d 245, 248-49 (1993). A mere conclusory statement, even if made under oath, is insufficient to establish the violation of any constitutional right. People v. Coleman, 32 Ill. App. 3d 949, 952 (1975). A trial judge who, prior to hearing any evidence, expresses the opinion that the

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defendant is guilty may be disqualified. People v. Williams, 272 Ill. App. 3d 868, 874-75 (1995).

Here, contrary to defendant's contention, there are no affidavits attached to the motion for substitution of judge. Defendant, however, is apparently asserting that the affidavits attached to his first postconviction petition were also intended to support his motion for substitution where the motion and petition were filed on the same date. Defendant's motion for substitution of judge and his petition for postconviction relief were two separate pleadings. Defendant was required to attach to the motion for substitution an affidavit supporting his allegations of prejudice. See Brim, 241 Ill. App. 3d at 248-49.

Moreover, even considering defendant's motion in conjunction with the affidavits attached to the postconviction petition, we find that the trial court did not abuse its discretion in denying the motion for substitution. Defendant alleged in his petition that the court was prejudiced against him because it determined his guilt prior to hearing any evidence. Defendant attested in his affidavit that, prior to the start of his trial, the court's deputy informed him that the judge was going to find him guilty and sentence him to 50 years in prison. Defendant's father attested that defendant told him what the court's deputy had said. These affidavits merely attest to the deputy's statement that the judge would find defendant guilty and sentence him to 50

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years. They give no indication that the judge told the deputy that he would find defendant guilty and impose a 50-year sentence. See Williams, 272 Ill. App. 3d at 874-75. Accordingly, defendant's allegation in his motion that the judge had found him guilty prior to trial was a mere conclusory allegation that did not mandate substitution. See Coleman, 32 Ill. App. 3d at 951-52.

In addition, the fact that defendant alleged judicial misconduct in his postconviction petition cannot be used as a basis to obtain substitution of his trial judge. See generally In re Marriage of Hartian, 222 Ill. App. 3d 566, 569 (1991) (the respondent failed to show prejudice by the trial judge where he filed a complaint against the judge with the Judicial Inquiry Board); People v. House, 202 Ill. App. 3d 893, 899-900, 909-910 (1990) (substitution not required where the defendant complained of the trial judge's rulings in his postconviction petition). Furthermore, a judge is presumed to be impartial even after extreme provocation. People v. Jackson, 205 Ill. 2d 247, 276 (2001); People v. Steidl, 177 Ill. 2d 239, 265 (1997). Moreover, if we were to conclude that an allegation of judicial misconduct in a postconviction petition would require recusal, then defendants could simply allege misconduct on their trial judge's part for the purpose of obtaining another judge. See generally People v. Smeathers, 297 Ill. App. 3d 711, 716 (1998) (filing a

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complaint against one's trial judge does not require substitution, because to hold otherwise would allow defendants to obtain a new judge by filing frivolous complaints "to force an endless stream of recusals"). Accordingly, we find that the trial court did not abuse its discretion in denying defendant's motion for substitution.

Next, defendant claims he was denied the effective assistance of trial counsel where counsel (1) failed to present "additional" evidence at the suppression hearing to prove defendant's confession was illegally obtained; (2) failed to raise the issue of judicial misconduct in his post-trial motion; (3) failed to present evidence of prosecutorial misconduct at the sentencing hearing; (4) failed to seek a lesser included offense or present a defense that defendant was innocent; (5) misled defendant into signing a jury waiver by promises of a 30-year sentence; and (6) failed to file a pre-trial motion for the recusal of the trial court. We disagree.

Postconviction relief is a collateral proceeding designed to allow inquiry into constitutional issues that could not have been previously adjudicated. People v. Franklin, 167 Ill. 2d 1, 9 (1995). To survive the State's motion to dismiss, the postconviction petition must make a substantial showing that defendant's constitutional rights were violated. People v. Coleman, 183 Ill. 2d 366, 381 (1998). We review the dismissal of

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a postconviction petition without an evidentiary hearing *de novo*. People v. Lander, 215 Ill. 2d 577, 583 (2005). When a defendant has taken a direct appeal, any issue capable of being raised on direct appeal is waived, and any issue that was previously decided is barred by *res judicata*. Franklin, 167 Ill. 2d at 9. Furthermore, where an amended postconviction petition, filed by appointed counsel, does not include allegations from the defendant's *pro se* postconviction petition, such issues are not before the court. People v. Phelps, 51 Ill. 2d 35, 38 (1972); Barnett v. Zion Park District, 171 Ill. 2d 378, 384 (1996) ("Where an amended pleading is complete in itself and does not refer to or adopt the prior pleading, the earlier pleading ceases to be part of the record for most purposes and is effectively abandoned and withdrawn.").

Defendant has waived his claims of ineffective assistance of counsel for failure to (1) present additional evidence at the suppression hearing; (2) raise the issue of judicial misconduct in a post-trial motion; (3) present evidence of prosecutorial misconduct; (4) failure to seek a lesser included offense or present an innocence defense; and (5) and for misleading defendant into signing a jury waiver by promises of a 30-year sentence because these issues were capable of being raised on direct appeal and because they were not contained in defendant's amended postconviction petition. See Franklin, 167 Ill. 2d at 9;

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Phelps, 51 Ill. 2d at 38. Defendant's argument that we should address these issues under the plain error doctrine does not persuade us differently.

Next, because he failed to include it in his amended postconviction petition, defendant has waived the claim that he was subject to the ineffective assistance of trial counsel where counsel failed to file a pre-trial motion for the recusal of the trial court. See Phelps, 51 Ill. 2d at 38; Zion Park District, 171 Ill. 2d at 384.

Next, defendant contends that his trial counsel was ineffective for failing to alert the court at the sentencing hearing that State's witness Dye's testimony was perjured. Specifically, defendant claims that Dye's testimony was "bolstered" by personal details of defendant's life which he learned through documents he stole from defendant while they were cellmates and via prosecutorial misconduct wherein the State gave Dye access to specific information about defendant. Because this issue was contained in defendant's amended postconviction petition, we will address it here.

To establish a claim of ineffective assistance of counsel, a defendant must show that (1) his attorney's representation fell below an objective standard of reasonableness; and (2) he was prejudiced by this deficient performance. Strickland v. Washington, 466 U.S. 668, 687-688, 80 L. Ed. 2d 674, 693, 104 S.



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Ct. 2052, 2064 (1984); People v. Coulter, 352 Ill. App. 3d 151, 157 (2004). To satisfy the first prong, a defendant must overcome the presumption that contested conduct which might be considered trial strategy is generally immune from claims of ineffective assistance of counsel. People v. Martinez, 348 Ill. App. 3d 521, 537 (2004); People v. Burks, 343 Ill. App. 3d 765, 775 (2003). Failure to make the requisite showing of either deficient performance or sufficient prejudice defeats the claim. People v. Palmer, 162 Ill. 2d 465, 475-76 (1994). After consultation with the client, trial counsel has the right to make the ultimate decision with respect to matters of tactics and strategy, including whether and how to conduct cross-examination. People v. Ramey, 152 Ill. 2d 41, 54 (1992).

Here, defendant fails to overcome the presumption that counsel's actions were a product of sound trial strategy. See Martinez, 348 Ill. App. 3d at 537; Burks, 343 Ill. App. 3d at 775. Defendant asserts that counsel should have (1) had defendant testify that he never spoke with Dye concerning his case; (2) had defendant testify that Dye stole documents from his cell; (3) present into evidence petitioner's inmate grievances in which defendant reported the alleged theft; (4) present into evidence copies of the stolen documents; (5) present testimony that Dye's testimony was perjured; and (6) force Dye to admit on cross-examination that his testimony was perjured.

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Counsel's representation was reasonable here, where counsel impeached Dye by eliciting testimony that he was a 14-time convicted felon who had previously been convicted of theft offenses in which he "worked [his] way into somebody's confidence" before stealing from them, that he had testified for the State in other unrelated cases, and that he was testifying against Defendant as part of a deal he had made with the State. Whether to further cross-examine Dye and whether to impeach with extrinsic evidence were matters of trial strategy. See Ramey, 152 Ill. 2d at 54.

Next, defendant contends that his trial counsel was ineffective for failing to present evidence of the mental states of defendant and the victim. Specifically, defendant asserts that this evidence would support a finding of second degree murder based upon sudden and intense passion resulting from serious provocation. We disagree.

The offense of first degree murder requires the State to prove that the offender, in pertinent part, intentionally killed another individual without lawful justification. 720 ILCS 5/9-1(a) (West 2002). A person commits second degree murder when he commits first degree murder under the mitigating circumstance of a sudden and intense passion resulting from serious provocation, which is conduct sufficient to excite an intense passion in a reasonable person, or an unreasonable subjective belief that he

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is justified in the use of deadly force. 720 ILCS 5/9-2 (West 2002). Once the State has proven first degree murder beyond a reasonable doubt, the burden shifts to defendant to prove one of the mitigation factors required to reduce the offense from first degree to second degree murder. People v. Thompson, 354 Ill. App. 3d 579, 586 (2004). For purposes of reducing first degree murder to second degree murder based on serious provocation, the only recognized categories of serious provocation are substantial physical injury or assault, mutual quarrel or combat, illegal arrest, and adultery with the offender's spouse. People v. Chevalier, 131 Ill. 2d 66, 71 (1989).

Here, even if counsel's representation was deficient, defendant's claim fails because he is unable to show resulting prejudice. Defendant contends that evidence of his depression and the victim's depression, if introduced at trial, would have mitigated his conviction to second degree murder. However, depression is not a recognized category of serious provocation. See Chevalier, 131 Ill. 2d at 71. Trial counsel was not ineffective for failing to present evidence which would not have supported a finding of second degree murder.

Defendant's reliance on People v. Williams, 265 Ill. App. 3d 283 (1994), does not persuade us differently. Williams is inapposite to the case at bar, where in Williams we did not review whether the trial court erred in reducing defendant's

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sentence from first degree murder to second degree murder.

Williams, 265 Ill. App. 3d 283.

Finally, defendant asserts that his postconviction counsel failed to substantially comply with the requirements of Rule 651(c). Specifically, defendant argues that postconviction counsel erred by failing to preserve various issues contained in defendant's *pro se* postconviction petition by not including them in the amended postconviction petition or the amendment to the amended postconviction petition. We disagree.

In second-stage postconviction proceedings, an indigent defendant is entitled to appointed counsel (725 ILCS 5/122-4 (West 2004)), who should provide a reasonable level of assistance. People v. Pendleton, 223 Ill. 2d 458, 472 (2006). Pursuant to Rule 651(c), counsel must consult with the defendant to ascertain his contentions of deprivation of constitutional rights, examine the record of trial proceedings, and amend the petition as necessary to ensure that defendant's contentions are adequately presented to the court. 134 Ill. 2d R. 651(c); Pendleton, 223 Ill. 2d at 472. Counsel's obligation to amend the petition as necessary does not require counsel to advance frivolous or spurious claims on defendant's behalf. Pendleton, 223 Ill. 2d at 472.

Defendant argues that postconviction counsel rendered unreasonable assistance where she (1) filed a "motion to remove"

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defendant's *pro se* postconviction petition and "supplanted" it with the amended postconviction petition; and (2) refused to include certain issues of prosecutorial error in the amended petition because she was worried about the repercussions it would have on her future clients because the two former assistant State's Attorneys who were involved in defendant's case are now members of the judiciary. We disagree.

We first note that the record does not support defendant's contention that counsel filed a "motion to remove" his petition. Accordingly, we will not further address this issue.

In a criminal proceeding, decisions such as what plea to enter, whether to testify, and whether to appeal belong exclusively to the defendant. People v. Bashaw, 361 Ill. App. 3d 963, 969 (2005). However, those decisions that are matters of trial tactics and strategy are to be made by trial counsel after consultation with the defendant. Bashaw, 361 Ill. App. 3d at 969. In Bashaw, this court determined that the decision of whether to amend a postconviction petition is more analogous to the strategic decisions entrusted to trial counsel than the "few core decisions" that belong to the defendant, and:

"[w]hat amendments to a postconviction petition, if any, are necessary to adequately present the defendant's contentions is a matter calling for the exercise of an

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attorney's professional judgment. An attorney who surrenders the decision to the defendant does not fulfill his or her duty to exercise that professional judgment."

Bashaw, 361 Ill. App. 3d at 969.

Here, we find that postconviction counsel rendered reasonable assistance to defendant. Counsel fully complied with the requirements of Rule 651(c). The record includes a signed certificate in compliance with Rule 651(c), stating that counsel reviewed defendant's pro se petition, record, transcripts, and brief, and "discussed the contents of the pro-se [sic] petition and the amended petition" with defendant in person. Defendant concedes that he spoke with counsel both in person and on the telephone. Furthermore, there is an affidavit attached to the amendment to the amended postconviction petition in which defendant attests that he reviewed both the amended postconviction petition and the amendment thereto. Accordingly, we find that counsel rendered the reasonable assistance mandated by Rule 651(c).

For the foregoing reasons, we affirm the judgment of the trial court.

Affirmed.

R. Gordon, J., with Wolfson, P.J. and Garcia, J., concurring.



FIRST DIVISION  
Filed: 08/06/07

**NOTICE**

the text of this order may be changed or corrected prior to the time for filing of a Petition for rehearing or the disposition of the same.

No. 1-04-2481

IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 95 CR 30463
	)	
THOMAS O'FARRELL,	)	Honorable
	)	Michael P. Toomin,
Defendant-Appellant.	)	Judge Presiding.

MODIFIED ORDER UPON DENIAL OF PETITION FOR REHEARING

Defendant Thomas O'Farrell appeals from an order of the trial court granting the State's motion to dismiss his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 et seq. (West 2002)) without an evidentiary hearing. On appeal, defendant contends that the trial court erred in denying his *pro se* motion for substitution of judge at the proceedings on his postconviction petition. In a *pro se* supplemental brief, defendant also contends that (1) the trial court erred in dismissing the petition without a hearing to determine whether defendant had received ineffective assistance of trial counsel; and (2) his postconviction counsel failed to comply with Illinois Supreme Court Rule 651(c) (134 Ill. 2d R. 651(c)). We affirm.

EXHIBIT R



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Following a bench trial, defendant was convicted of first degree murder for the shooting death of his wife, and sentenced to 50 years in prison. On direct appeal, this court affirmed defendant's conviction and sentence, but modified the mittimus to reflect that defendant was to receive one day of good conduct credit for each day in prison. People v. O'Farrell, No. 1-97-0911 (1999) (unpublished order under Supreme Court Rule 23). The facts of the offense are fully set out in our order on direct appeal; we restate here only those facts necessary to an understanding of defendant's current appeal.

Prior to trial, defendant filed a motion to suppress statements allegedly made by him to inmate Thomas Dye. The court denied the motion.

Evidence at trial showed that at around 4 a.m. on September 28, 1995, defendant killed his wife, Lesley O'Farrell, by shooting her once in the head and once in the chest while she was sleeping, and then shot himself in the shoulder. Initially, defendant told responding police officers that he awoke to the sound of a gunshot and saw a 6 foot, 3 inch, 200-pound African American man shoot his wife. He then struggled with the home invader and was shot in the ensuing scuffle. Later, however, defendant told police officers that he shot his wife pursuant to her request. Specifically, defendant told officers that, because his wife suffered from many physical ailments and no longer

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wished to live, she devised a plan whereby he would kill her while she slept. The court found defendant guilty of first degree murder.

A capital sentencing hearing was held, after which the court determined defendant was not eligible for the death penalty. Prior to sentencing, defendant filed a motion for a new trial alleging, *inter alia*, that the court erred in denying his pretrial motion to suppress statements made to Dye. After hearing arguments, the court denied the motion.

At sentencing, Dye testified over defendant's renewed objection that he shared a jail cell with defendant in November and December 1995. During that time, he and defendant often spoke about defendant's crime. According to Dye, defendant married the victim and eventually killed her to gain access to her family's money. Specifically, defendant and the victim had a son, Leroi, who was to inherit the victim's money in the event of her death. Defendant believed that, at worst, the court would find him guilty of second degree murder because (1) his father was a police officer; (2) the victim was so ill that it would be considered a mercy killing; (3) he had no criminal background; and (4) he was "clean-cut." Dye testified that defendant believed if he was convicted of second degree murder, he would be out of prison before his son turned 18, and "would control the

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inheritance based on his son being a minor." Dye testified that defendant never expressed remorse for killing his wife.

On cross-examination, Dye admitted that he had access to defendant's property because he shared a jail cell with defendant. He also admitted that he had previously been incarcerated for theft crimes in which he "worked [his] way into somebody's confidence and got into their apartments and stole from them." Dye admitted that he had 14 felony convictions at the time of this trial, was testifying in connection with a plea agreement, and that he had testified for the State in previous unrelated cases.

Clinical psychologist Dr. Larry Heinrich testified as an expert in forensic psychology. He testified that he met with defendant and examined the reports of another physician, Dr. Robbins, who had treated both defendant and the victim. Based on those reports, Dr. Heinrich believed that, at the time of the shooting, defendant suffered depression exacerbated by the stress of both his marriage and the victim's depression. Based on Dr. Robbins' reports and the victim's diary, Dr. Heinrich believed the victim had "passive suicidal ideation." On cross-examination, Dr. Heinrich admitted that he had not spoken with Dr. Robbins about the victim or defendant.

Defendant's brother and brother-in-law both testified that defendant was a caring father to his son.

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The court sentenced defendant to 50 years in prison. Defendant's conviction was affirmed on appeal. People v. O'Farrell, No. 1-97-0911 (1999) (unpublished order under Supreme Court Rule 23).

In January 2000, defendant filed a *pro se* postconviction petition which was later amended by postconviction counsel. The initial *pro se* petition alleged, in relevant part, that trial counsel was ineffective for failing to present evidence of judicial misconduct in a post-trial motion. Defendant attached his own affidavit and that of his father. Defendant attested that the "Deputy \*\*\* told [him] in the elevator, prior to trial, that, '[the trial judge was] going to find [him] guilty and give [defendant] fifty (50) years.'" Defendant's father attested that defendant informed him that the court's "Deputy \*\*\* told [defendant] that he was going to be found guilty and sentenced to fifty (50) years."

On the same date that defendant filed his petition, he also filed a *pro se* "motion for different judge to consider" (motion for substitution), alleging that the trial judge would be biased against him in deciding his postconviction petition because he mentioned the trial judge in his petition when he discussed judicial misconduct. Defendant also alleged that he was prejudiced by the trial court's bias because the trial court had predetermined his guilt.

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On February 15, 2000, the court denied the motion for substitution,<sup>1</sup> noting that

"[i]t is not supported by affidavit pursuant to the statute. \*\*\* [Defendant] mentions that the judge is under judicial misconduct and, therefore, the judge would be biased against him. There is no such allegation in his petition. And he also alleges that since the trial court also found the Defendant guilty and sentenced him, therefore, he would be prejudiced. The Defendant's motion does not rise to a level of allegations to substitute [the trial judge] for cause. It is unsupported pursuant to the statute."

Subsequently, appointed counsel amended defendant's postconviction petition without adopting defendant's pro se postconviction petition. This amended petition is the subject of this appeal. The State filed a motion to dismiss, which the trial court granted on October 4, 2001.<sup>2</sup> The amended

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<sup>1</sup>It appears that defendant appealed the denial of his motion for substitution of judge, but then moved to dismiss it on his own motion, which this court allowed. People v. O'Farrell, No. 1-00-0968 (2001) (dispositional order).

<sup>2</sup>While defendant's first postconviction petition was pending in the circuit court, defendant filed an appeal, which he subsequently moved to dismiss. This court allowed the dismissal. People v. O'Farrell, No. 1-00-0968 (2001) (dispositional order).

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postconviction petition contained the following claims: (1) defendant was denied the effective assistance of trial counsel where counsel's performance at the suppression hearing, trial, and sentencing hearing was inadequate; (2) defendant was denied the effective assistance of appellate counsel where counsel failed to raise certain issues on appeal; and (3) the trial court erred in allowing State's witness Dye to testify without ensuring that defendant was tendered all pertinent information and by failing to take judicial notice of "applicable statutes concerning the Probate of Minor Estates laws in Illinois." Defendant's counsel then filed an "amendment to amended post conviction petition" which added a fourth claim, that defendant's sentence was excessive. Attached to this document is defendant's affidavit, in which he attests, *inter alia*,

"4. I have reviewed the Amended Post Conviction Petition and the Amendment to the Post Conviction Petition;

5. All factual allegations are true to the best of my knowledge."

In May 2003, defendant filed a second *pro se* petition for relief and another motion for substitution of judge. In July

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2003, the second petition and the motion for substitution of judge were both denied.<sup>3</sup>

On appeal, defendant first contends that the court erred in denying his motion for substitution of judge in February 2000. Specifically, defendant asserts that the court made reversible error when it based its decision on the incorrect belief that (1) defendant's argument was that the trial court would be biased because it had previously found him guilty; (2) defendant did not raise the issue of judicial misconduct in his petition; and (3) the petition was not supported by the necessary affidavit. We disagree.

As an initial matter, defendant's failure to indicate that he was appealing the denial of his motion for substitution of judge in his notice of appeal does not result in this court's loss of jurisdiction over that order because such an order was a step in the procedural progression leading to the order mentioned in the notice of appeal. See Jiffy Lube International v. Agarwal, 277 Ill. App. 3d 722, 727 (1996).

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<sup>3</sup>Twice defendant appealed the dismissal of his second postconviction petition, but then moved to dismiss it. This court allowed both dismissals. People v. O'Farrell, Nos. 1-03-2619 and 1-03-3404 (2004) (dispositional orders). Defendant then filed a third postconviction petition, which the circuit court dismissed. Defendant appealed the dismissal, and defendant's appellate counsel moved to withdraw pursuant to Pennsylvania v. Finley, 481 U.S. 551, 95 L. Ed. 2d 539, 107 S. Ct. 1990 (1987). This court allowed the withdrawal and affirmed the judgment. People v. O'Farrell, No. 1-04-1094 (2005) (unpublished order pursuant to Supreme Court Rule 23).

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We next note that defendant incorrectly asserts that the standard of review is *de novo* because the trial court allegedly failed to consider crucial evidence in denying his motion for substitution. The standard for reviewing the trial court's denial of defendant's motion for substitution of judge is abuse of discretion. See People v. Meeks, 249 Ill. App. 3d 152, 160 (1993). Furthermore, we review the trial court's judgment, not its reasons for the judgment. People v. Lee, 344 Ill. App. 3d 851, 853 (2003). Accordingly, we may affirm a trial court's judgment on any basis supported by the record, regardless of its reasons for reaching the decision. Lee, 344 Ill. App. 3d at 853. We now turn to the issue on appeal.

There is no absolute right to substitution of a judge at a postconviction proceeding. People v. Enis, 194 Ill. 2d 361, 416 (2000). Rather, defendant must show that he will be substantially prejudiced if the motion is denied. Enis, 194 Ill. 2d at 416. A defendant seeking substitution of judge for alleged prejudice must support such an allegation with an affidavit. People v. Brim, 241 Ill. App. 3d 245, 248-49 (1993). A mere conclusory statement, even if made under oath, is insufficient to establish the violation of any constitutional right. People v. Coleman, 32 Ill. App. 3d 949, 952 (1975). A trial judge who, prior to hearing any evidence, expresses the opinion that the



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defendant is guilty may be disqualified. People v. Williams, 272 Ill. App. 3d 868, 874-75 (1995).

Here, contrary to defendant's contention, there are no affidavits attached to the motion for substitution of judge. Defendant, however, is apparently asserting that the affidavits attached to his first postconviction petition were also intended to support his motion for substitution where the motion and petition were filed on the same date. Defendant's motion for substitution of judge and his petition for postconviction relief were two separate pleadings. Defendant was required to attach to the motion for substitution an affidavit supporting his allegations of prejudice. See Brim, 241 Ill. App. 3d at 248-49.

Moreover, even considering defendant's motion in conjunction with the affidavits attached to the postconviction petition, we find that the trial court did not abuse its discretion in denying the motion for substitution. Defendant alleged in his petition that the court was prejudiced against him because it determined his guilt prior to hearing any evidence. Defendant attested in his affidavit that, prior to the start of his trial, the court's deputy informed him that the judge was going to find him guilty and sentence him to 50 years in prison. Defendant's father attested that defendant told him what the court's deputy had said. These affidavits merely attest to the deputy's statement that the judge would find defendant guilty and sentence him to 50

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years. They give no indication that the judge told the deputy that he would find defendant guilty and impose a 50-year sentence. See Williams, 272 Ill. App. 3d at 874-75. Accordingly, defendant's allegation in his motion that the judge had found him guilty prior to trial was a mere conclusory allegation that did not mandate substitution. See Coleman, 32 Ill. App. 3d at 951-52.

In addition, the fact that defendant alleged judicial misconduct in his postconviction petition cannot be used as a basis to obtain substitution of his trial judge. See generally In re Marriage of Hartian, 222 Ill. App. 3d 566, 569 (1991) (the respondent failed to show prejudice by the trial judge where he filed a complaint against the judge with the Judicial Inquiry Board); People v. House, 202 Ill. App. 3d 893, 899-900, 909-910 (1990) (substitution not required where the defendant complained of the trial judge's rulings in his postconviction petition). Furthermore, a judge is presumed to be impartial even after extreme provocation. People v. Jackson, 205 Ill. 2d 247, 276 (2001); People v. Steidl, 177 Ill. 2d 239, 265 (1997). Moreover, if we were to conclude that an allegation of judicial misconduct in a postconviction petition would require recusal, then defendants could simply allege misconduct on their trial judge's part for the purpose of obtaining another judge. See generally People v. Smeathers, 297 Ill. App. 3d 711, 716 (1998) (filing a

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complaint against one's trial judge does not require substitution, because to hold otherwise would allow defendants to obtain a new judge by filing frivolous complaints "to force an endless stream of recusals"). Accordingly, we find that the trial court did not abuse its discretion in denying defendant's motion for substitution.

Next, defendant claims he was denied the effective assistance of trial counsel where counsel (1) failed to present "additional" evidence at the suppression hearing to prove defendant's confession was illegally obtained; (2) failed to raise the issue of judicial misconduct in his post-trial motion; (3) failed to present evidence of prosecutorial misconduct at the sentencing hearing; (4) failed to seek a lesser included offense or present a defense that defendant was innocent; (5) misled defendant into signing a jury waiver by promises of a 30-year sentence; and (6) failed to file a pre-trial motion for the recusal of the trial court. We disagree.

Postconviction relief is a collateral proceeding designed to allow inquiry into constitutional issues that could not have been previously adjudicated. People v. Franklin, 167 Ill. 2d 1, 9 (1995). To survive the State's motion to dismiss, the postconviction petition must make a substantial showing that defendant's constitutional rights were violated. People v. Coleman, 183 Ill. 2d 366, 381 (1998). We review the dismissal of

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a postconviction petition without an evidentiary hearing *de novo*. People v. Lander, 215 Ill. 2d 577, 583 (2005). When a defendant has taken a direct appeal, any issue capable of being raised on direct appeal is waived, and any issue that was previously decided is barred by *res judicata*. Franklin, 167 Ill. 2d at 9. Furthermore, where an amended postconviction petition, filed by appointed counsel, does not include allegations from the defendant's *pro se* postconviction petition, such issues are not before the court. People v. Phelps, 51 Ill. 2d 35, 38 (1972); Barnett v. Zion Park District, 171 Ill. 2d 378, 384 (1996) ("Where an amended pleading is complete in itself and does not refer to or adopt the prior pleading, the earlier pleading ceases to be part of the record for most purposes and is effectively abandoned and withdrawn.").

Defendant has waived his claims of ineffective assistance of counsel for failure to (1) present additional evidence at the suppression hearing; (2) raise the issue of judicial misconduct in a post-trial motion; (3) present evidence of prosecutorial misconduct; (4) failure to seek a lesser included offense or present an innocence defense; and (5) and for misleading defendant into signing a jury waiver by promises of a 30-year sentence because these issues were capable of being raised on direct appeal and because they were not contained in defendant's amended postconviction petition. See Franklin, 167 Ill. 2d at 9;

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Phelps, 51 Ill. 2d at 38. Defendant's argument that we should address these issues under the plain error doctrine does not persuade us differently.

Next, because he failed to include it in his amended postconviction petition, defendant has waived the claim that he was subject to the ineffective assistance of trial counsel where counsel failed to file a pre-trial motion for the recusal of the trial court. See Phelps, 51 Ill. 2d at 38; Zion Park District, 171 Ill. 2d at 384.

Next, defendant contends that his trial counsel was ineffective for failing to alert the court at the sentencing hearing that State's witness Dye's testimony was perjured. Specifically, defendant claims that Dye's testimony was "bolstered" by personal details of defendant's life which he learned through documents he stole from defendant while they were cellmates and via prosecutorial misconduct wherein the State gave Dye access to specific information about defendant. Because this issue was contained in defendant's amended postconviction petition, we will address it here.

To establish a claim of ineffective assistance of counsel, a defendant must show that (1) his attorney's representation fell below an objective standard of reasonableness; and (2) he was prejudiced by this deficient performance. Strickland v. Washington, 466 U.S. 668, 687-688, 80 L. Ed. 2d 674, 693, 104 S.

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Ct. 2052, 2064 (1984); People v. Coulter, 352 Ill. App. 3d 151, 157 (2004). To satisfy the first prong, a defendant must overcome the presumption that contested conduct which might be considered trial strategy is generally immune from claims of ineffective assistance of counsel. People v. Martinez, 348 Ill. App. 3d 521, 537 (2004); People v. Burks, 343 Ill. App. 3d 765, 775 (2003). Failure to make the requisite showing of either deficient performance or sufficient prejudice defeats the claim. People v. Palmer, 162 Ill. 2d 465, 475-76 (1994). After consultation with the client, trial counsel has the right to make the ultimate decision with respect to matters of tactics and strategy, including whether and how to conduct cross-examination. People v. Ramey, 152 Ill. 2d 41, 54 (1992).

Here, defendant fails to overcome the presumption that counsel's actions were a product of sound trial strategy. See Martinez, 348 Ill. App. 3d at 537; Burks, 343 Ill. App. 3d at 775. Defendant asserts that counsel should have (1) had defendant testify that he never spoke with Dye concerning his case; (2) had defendant testify that Dye stole documents from his cell; (3) present into evidence petitioner's inmate grievances in which defendant reported the alleged theft; (4) present into evidence copies of the stolen documents; (5) present testimony that Dye's testimony was perjured; and (6) force Dye to admit on cross-examination that his testimony was perjured.

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Counsel's representation was reasonable here, where counsel impeached Dye by eliciting testimony that he was a 14-time convicted felon who had previously been convicted of theft offenses in which he "worked [his] way into somebody's confidence" before stealing from them, that he had testified for the State in other unrelated cases, and that he was testifying against Defendant as part of a deal he had made with the State. Whether to further cross-examine Dye and whether to impeach with extrinsic evidence were matters of trial strategy. See Ramey, 152 Ill. 2d at 54.

Next, defendant contends that his trial counsel was ineffective for failing to present evidence of the mental states of defendant and the victim. Specifically, defendant asserts that this evidence would support a finding of second degree murder based upon sudden and intense passion resulting from serious provocation. We disagree.

The offense of first degree murder requires the State to prove that the offender, in pertinent part, intentionally killed another individual without lawful justification. 720 ILCS 5/9-1(a) (West 2002). A person commits second degree murder when he commits first degree murder under the mitigating circumstance of a sudden and intense passion resulting from serious provocation, which is conduct sufficient to excite an intense passion in a reasonable person, or an unreasonable subjective belief that he

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is justified in the use of deadly force. 720 ILCS 5/9-2 (West 2002). Once the State has proven first degree murder beyond a reasonable doubt, the burden shifts to defendant to prove one of the mitigation factors required to reduce the offense from first degree to second degree murder. People v. Thompson, 354 Ill. App. 3d 579, 586 (2004). For purposes of reducing first degree murder to second degree murder based on serious provocation, the only recognized categories of serious provocation are substantial physical injury or assault, mutual quarrel or combat, illegal arrest, and adultery with the offender's spouse. People v. Chevalier, 131 Ill. 2d 66, 71 (1989).

Here, even if counsel's representation was deficient, defendant's claim fails because he is unable to show resulting prejudice. Defendant contends that evidence of his depression and the victim's depression, if introduced at trial, would have mitigated his conviction to second degree murder. However, depression is not a recognized category of serious provocation. See Chevalier, 131 Ill. 2d at 71. Trial counsel was not ineffective for failing to present evidence which would not have supported a finding of second degree murder.

Defendant's reliance on People v. Williams, 265 Ill. App. 3d 283 (1994), does not persuade us differently. Williams is inapposite to the case at bar, where in Williams we did not review whether the trial court erred in reducing defendant's



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sentence from first degree murder to second degree murder.

Williams, 265 Ill. App. 3d 283.

Finally, defendant asserts that his postconviction counsel failed to substantially comply with the requirements of Rule 651(c). Specifically, defendant argues that postconviction counsel erred by failing to preserve various issues contained in defendant's *pro se* postconviction petition by not including them in the amended postconviction petition or the amendment to the amended postconviction petition. We disagree.

In second-stage postconviction proceedings, an indigent defendant is entitled to appointed counsel (725 ILCS 5/122-4 (West 2004)), who should provide a reasonable level of assistance. People v. Pendleton, 223 Ill. 2d 458, 472 (2006). Pursuant to Rule 651(c), counsel must consult with the defendant to ascertain his contentions of deprivation of constitutional rights, examine the record of trial proceedings, and amend the petition as necessary to ensure that defendant's contentions are adequately presented to the court. 134 Ill. 2d R. 651(c); Pendleton, 223 Ill. 2d at 472. Counsel's obligation to amend the petition as necessary does not require counsel to advance frivolous or spurious claims on defendant's behalf. Pendleton, 223 Ill. 2d at 472.

Defendant argues that postconviction counsel rendered unreasonable assistance where she (1) filed a "motion to remove"

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defendant's *pro se* postconviction petition and "supplanted" it with the amended postconviction petition; and (2) refused to include certain issues of prosecutorial error in the amended petition because she was worried about the repercussions it would have on her future clients because the two former assistant State's Attorneys who were involved in defendant's case are now members of the judiciary. We disagree.

We first note that the record does not support defendant's contention that counsel filed a "motion to remove" his petition.

A careful review of the record reveals that defendant has misconstrued the record and the motion he claims was erroneously made does not exist. Postconviction counsel did not withdraw defendant's *pro se* petition; rather, postconviction counsel failed to incorporate the *pro se* allegations into her amended petition. This may be a distinction without difference, from defendant's perspective. Nevertheless, defendant misreads the record, and the motion he claims was made in the trial court was actually made in this court and was a motion to withdraw an earlier appeal.

In a criminal proceeding, decisions such as what plea to enter, whether to testify, and whether to appeal belong exclusively to the defendant. People v. Bashaw, 361 Ill. App. 3d 963, 969 (2005). However, those decisions that are matters of trial tactics and strategy are to be made by trial counsel after

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consultation with the defendant. Bashaw, 361 Ill. App. 3d at 969. In Bashaw, this court determined that the decision of whether to amend a postconviction petition is more analogous to the strategic decisions entrusted to trial counsel than the "few core decisions" that belong to the defendant, and:

"[w]hat amendments to a postconviction petition, if any, are necessary to adequately present the defendant's contentions is a matter calling for the exercise of an attorney's professional judgment. An attorney who surrenders the decision to the defendant does not fulfill his or her duty to exercise that professional judgment."

Bashaw, 361 Ill. App. 3d at 969.

Here, we find that postconviction counsel rendered reasonable assistance to defendant. Counsel fully complied with the requirements of Rule 651(c). The record includes a signed certificate in compliance with Rule 651(c), stating that counsel reviewed defendant's pro se petition, record, transcripts, and brief, and "discussed the contents of the pro-se [sic] petition and the amended petition" with defendant in person. Defendant concedes that he spoke with counsel both in person and on the telephone. Furthermore, there is an affidavit attached to the amendment to the amended postconviction petition in which

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defendant attests that he reviewed both the amended postconviction petition and the amendment thereto. Accordingly, we find that counsel rendered the reasonable assistance mandated by Rule 651(c).

In defendant's petition for rehearing, defendant argues that postconviction counsel's Rule 651(c) certificate was inadequate. Defendant failed to raise this argument in either his initial supplemental brief or his supplemental reply brief. As this argument has been raised for the first time in a petition for rehearing it is waived. See Supreme Court Rule 341(e)(7) (188 Ill. 2d R. 341(e)(7)) now codified as amended as Supreme Court Rule 341(h)(7) (210 Ill. 2d R. 341(h)(7)).

For the foregoing reasons, we affirm the judgment of the trial court.

Affirmed.

R. GORDON, J., with WOLFSON, P.J. and GARCIA, J., concurring.





NO. \_\_\_\_\_

IN THE SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,  
Respondent,

v.

THOMAS O'FARRELL,  
Petitioner,

) Appellate Court,  
) First District  
) No. 1-04-2481  
)  
) Circuit Court,  
) Cook County, Illinois  
) No. 95 CR 30463  
)  
) Honorable Michael P. Toomin,  
) Judge Presiding

PETITION FOR LEAVE TO APPEAL

Thomas O'Farrell,  
Pro-Se, Petitioner  
Reg. No. K54340  
P.O. Box 99  
Pontiac, Illinois 61764

EXHIBIT S

IN THE  
SUPREME COURT OF ILLINOIS

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People of the State of Illinois,	)	Appellate Court,
Respondent,	)	First District
	)	No. 1-04-2481
	)	
v.	)	Circuit Court,
	)	Cook County, Illinois
	)	No. 95 CR 30463
	)	
Thomas O'Farrell,	)	Honorable Michael P. Toomin,
Petitioner,	)	Judge Preseiding

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PETITION FOR LEAVE TO APPEAL

1. PRAYER FOR LEAVE TO APPEAL

Your Petitioner, Thomas O'Farrell, Pro-Se, respectfully petitions this Honorable Court for leave to appeal pursuant to Supreme Court Rule 315, from judgment of the Illinois Appellate Court, First Judicial District, which affirmed the judgment of the trial court on his pro-se post-conviction petition which was filed in the Circuit Court of Cook County, Illinois on January 26, 2000. (see exhibit attached to petition for rehearing)

2. OPINION AND PROCEEDING BELOW

On January 26, 2000, Petitioner filed a por-se petition for post-conviction relief and a motion for substitution of judge. The pro-se petition survived the 1st stage of the post-conviction proceedings and counsel was appointed. (see exhibit 15) On April 12, 2001, appointed counsel filed either a oral or written motion to withdraw appeal (pro-se petition. (see exhibit 35) On April 13, 2001, appointed counsel filed an amended petition for post-conviction relief. On October 4, 2001, the trial court granted the State's motion to dismiss petition. Petitioner was given leave to file a late notice of appeal. On March 7, 2005, appointed counsel filed a brief and argument challenging only the denial



of the motion for substitution of judge. On June 9, 2005, Petitioner filed a motion for leave to file a supplemental brief. On June 15, 2005, the Appellate Court denied Petitioner leave to file the supplemental brief. On August 30, 2005, the Appellate Court affirmed the denial of the substitution of judge. On October 20, 2005, Petitioner's petition for leave to appeal was filed by the Clerk of the Supreme Court and case #101468 was assigned. On January 25, 2006, this Honorable Court denied the PLA and issued a supervisory order instructing the Appellate Court to vacate it's judgment and allow Petitioner to file a pro-se supplemental brief raising any appellate issue(s) defendant deems appropriate. (see Appendix B, exhibit 3) In March 2006, the Appellate Court entered an order allowing Petitioner to file his pro-se supplemental brief. On April 26, 2006, Petitioner filed his pro-se supplemental brief raising the issues he deemed to be appropriate. On May 21, 2007, the Appellate Court denied Petitioner's appeal. On June 11, 2007 a petition for rehearing was filed. On July 26, 2007, the Appellate Court denied the petition for rehearing. On August 6, 2007, the Appellate Court issued it's modified order upon denial of petition for rehearing. (see Appendix B, exhibit 2) This appeal follows.

### 3. POINTS RELIED UPON FOR REVERSAL

1. Whether a fundamental miscarriage of justice occurred within this case at bar, when Petitioner was convicted and sentenced for an offense that he is actually innocent of and whether the sentence imposed upon Petitioner violates his Constitutional Rights secured by both the 8th Amendment of the United States Constitution and Article 1, Section 11 of the Illinois Constitution.

2. Whether Petitioner's Constitutional Right to due process secured by the 5th & 14th Amendment of the United States Constitution as well as Article 1, Section 2 of the Illinois Constitution were substantially violated by the Cook County State's Attorney's Office where the prosecution knowingly used the perjured testimony of State's witness, Thomas Dye during Petitioner's sentencing hearing.

3. Whether Petitioner's Constitutional Rights secured by both the United States and Illinois Constitutions under the Right to effective assistance of counsel and dueprocess (U.S. Const. 6th & 14th Amends. and Ill. Const., Art. 1, Sec.'s 2 & 8), were substantially violated by trial counsel who failed to develop and pursue viable trial strategies which were logical under the circumstances of this case at bar, by either pursuing a lesser offense and/or defense based upon the statutory provision (a)(2)(ii) of 720 ILCS 5/12-31, inducement to commit suicide or statutory provision (a)(1)(b) of 720 ILCS 5/9-2, second degree murder.

4. Whether Petitioner's Constitutional Rights to a fair and impartial trial which is secured by both the 6th Amendment of the United States Constitution as well as Article 1, Section 8 of the Illinois Constitution were substantially violated by the trial judge who failed to recuse himself under Supreme Court Rule 63, Canon 3(C)(1)(a), upon receiving and reading ex parte communications informing the judge of several disputed evidentiary facts concerning Petitioner's proceedings as well as Petitioner's past criminal history.

5. Whether Petitioner's Constitutional Rights to a trial by jury which is secured by both the 6th Amendment of the United States Constitution as well as Article 1, Section 8 of the Illinois Constitution were substantially violated by trial counsel who used coercive tactics and false promises in order to acquiescence a jury waiver from Petitioner and allow Petitioner to proceed to a bench trial in front of a judge who was notified of disputed evidentiary facts concerning the case at bar and Petitioner's past criminal history.

6. Whether Petitioner's Constitutional Rights secured by the 5th, 6th & 14th Amendments of the United States Constitution as well as Article 1, Sections 2, 8 & 10 of the Illinois Constitution were substantially violated by trial counsel and the police where trial counsel failed to present direct evidence during the suppression hearing that corroborated Petitioner's claim that Detective Schaks threat to have Petitioner's son taken by the Department of Children and Family Services if Petitioner did not cooperate and give an incriminating statement. (Tr. A-44-45)

7. Whether Petitioner's Constitutional Rights secured by the 6th & 14th Amendment of the United States Constitution as well as Article 1, Sections 2 & 8 of the Illinois Constitution under due process were substantially violated by direct appeal counsel, who failed to incorporate within Petitioner's direct appeal brief the claims of ineffective assistance of trial counsel herein this petition to preserve further review.

8. Whether Petitioner was denied the required level of assistance of counsel in violation of Illinois Supreme Court Rule 651(c), where appellate counsel removed Petitioner's original pro-se post-conviction petition which contained Petitioner's contentions regarding meritorious claims of ineffective assistance of trial counsel without Petitioner's authority after the petition survived the first stage of post-conviction proceedings and was docketed for further determination in the second stage.

9. Whether the Appellate Court erred, denying Petitioner's Constitutional Right to due process secured by both the United States and Illinois Constitutions.

#### 4. STATEMENT OF FACTS

The evidence at trial showed that at around 4 a.m. on September 28, 1995, the police were summons to the home of the victim, Lesley Chapman-O'Farrell and the Petitioner through a 911 call where Petitioner alleged that an unknown assailant and broken into their home and shot both the victim and Petitioner. Petitioner initially told the responding officers, Officer Cooper and Detectives Kernan and Schak that he was awoke by the sound of a gunshot were he then saw a 6 foot, 3 inch, 200-pound African American male shoot his wife, Lesley. Petitioner then stated that he then struggled with the home invader and was shot in the scuffle. It was later revealed in Petitioner's confession that he merely assisted in his wife, Lesley's suicide. Petitioner stated that his wife, Lesley was terminally ill, suffered from multiple ailments and no longer wished to live. Petitioner told Detective Schak that his wife, Lesley obtained a derringer, and removed a pane of glass from the downstairs bathroom per a plan devised by the victim, Lesley whereby Petitioner would shoot her and end her pain and suffering while she slept and blame it on an intruder, a 6 foot, 3 inch, 200-pound African American male. Petitioner further revealed that his wife, Lesley attempted suicide in the past and that she continuously plead with Petitioner to help her end her life. Per Petitioner's confession, he finally agreed to assist in the suicide by executing the plan upon his wife, Lesley's request and shot her once in the head. As Petitioner sat there, his wife, Lesley began to moan and shake. It was at this time Petitioner realized that she was still alive and must be in more pain, so Petitioner reloaded the gun and shot Lesley once in the chest causing her death. Petitioner then began to follow the plan devised by his wife, Lesley and then attempted to conceal the truth by staging the break-in and shooting himself in the shoulder. The court found Petitioner guilty

of first degree murder.

A capitol sentencing hearing was held, after which the court declared that the State failed to prove premeditation and determined that Petitioner was not eligible for the death penalty.

At the sentencing hearing, State's witness, Thomas Dye testified over Petitioner's renewed objection that he shared a jail cell with Petitioner and during that time, he and Petitioner often spoke about Petitioner's crime. According to Dye, Petitioner married the victim and eventually killed her to gain access to her family's money. Specifically, Petitioner and the victim had a son, LeRoi, who was to inherit the victim's money in the event of her death. Petitioner believed that, at worst, the court would find him guilty of second degree murder because (1) his father was a police officer; (2) the victim was so ill that it would be considered and mercy killing; (3) he had no criminal background; and (4) he was "clean-cut." Dye testified that Petitioner believed if he was convicted of second degree murder, he would be out of prison before his son turned 18, and "would control the inheritance based on his son being a minor." Dye also testified that Petitioner never expressed remorse for killing his wife.

On cross-examination, Dye admitted that he had access to Petitioner's property because he shared a jail cell with Petitioner. He also admitted that he had previously been incarcerated for theft crimes in which he "worked [his] way into somebody's confidence and got into their apartments and stole from them." Dye admitted that he had 14 felony convictions at the time of the hearing, was testifying in connection with a plea agreement, and that he had testified for the State in previous unrelated cases.

Clinical psychologist, Dr. Larry Heinrich testified as an expert in forensic psychology. He testified that he had met with Petitioner and examined the reports of another physician, Dr. Kenith Robins, who had

treated the victim and Petitioner. Based on those reports, Dr. Heinrich believed that, at the time of the shooting, Petitioner suffered depression exacerbated by the stress of both his marriage and the victim's illness and depression. Based on Dr. Robins' reports and the victim's diary, Dr. Heinrich believed the victim had "passive suicidal ideations." Dr. Heinrich further testified that he believed that he believed that Petitioner's actions were as a Dr. Kevorkian assisted suicide.

Petitioner's adopted-brother testified to how he had lost his parents when he was young and that Petitioner asked his parents to take him in and eventually he was adopted. Petitioner's adopted-brother and brother-in-law testified that Petitioner was a caring father to his son. Petitioner's brother-in-law further testified that after being stabbed by another person, Petitioner provided first-aid, saving his life and made sure the assailant did not flee until the police arrived.

The evidence at sentencing also showed that Petitioner had a great deal of support from his family and friend, and that Petitioner had demonstrated many admirable qualities during the course of his life. The court was also presented with over 30 letters from Petitioner's siblings, cousins, aunts, uncles, and friend. One of these letters is from Marcus Cartlidge, an inmate at Cook County Correctional Center. In his letter, Mr. Cartlidge describes an incident where he was attacked by two inmates. During the attack, Petitioner came to Cartlidge's aid, pulling the attackers off Cartlidge, and prevented him from being seriously injured. In the course of helping Cartlidge, Petitioner was injured himself.

The court sentenced Petitioner to a 50 year prison term. Petitioner's conviction was affirmed and the sentence was modified on appeal. People v. O'Farrell, No. 1-97-0911 (1999) (unpublished order under Supreme Court Rule 23)

In January, 2000, Petitioner filed a pro-se post-conviction petition with the Clerk of the Circuit Court. (see exhibit attached to petition for rehearing No. 1-04-2481) Petitioner's original petition was removed upon a motion to withdraw appeal on April 12, 2001 and appellate counsel filed an amended petition and an amendment to the amended petition. The original pro-se petition alleged, in relevant part, that trial counsel was ineffective on many levels.

On the same date that Petitioner filed his pro-se petition, he also filed a pro-se "motion for different judge to consider" (motion for substitution of judge), alleging that trial court would be biased against him in deciding his post-conviction petition as Petitioner raised judicial misconduct within his original petition.

On February 15, 2000, the court denied the motion for substitution.

Subsequently, appointed counsel removed Petitioner's pro-se petition and filed an amended and amendment to the amended petition without adopting Petitioner's original petition.

The State filed a motion to dismiss, which the trial court granted on October 4, 2001.

In May 2003, Petitioner filed a second pro-se petition for relief and another motion for substitution of judge. In July 2003, the second petition and motion were both denied.

Petitioner appealed to the Appellate Court on both denials No. 1-03-2619 and 1-03-3404 (2004). Later Petitioner filed a motion to dismiss appeal No. 1-03-2619 and a motion to dismiss appeal as moot No. 1-03-3404 (see Appendix B, exhibit 5 & 6), so that Petitioner could file a late notice of appeal on No. 1-04-2481.

Each motion was granted by the Appellate Court and counsel was appointed for the appeal. Appellate counsel within her brief that she

filed upon Petitioner's behalf only addressed the Motion for substitution of judge, counsel refused to raise any of the claims within Petitioner's original pro-se petition for post-conviction relief. Upon speaking with appellate counsel, Petitioner took it upon himself to file an motion to remove counsel and proceed on appeal pro-se, motion for leave to file a supplemental brief instant and supplementatl brief. All motions were subsequently denied by the court.

Petitioner next filed a petition for leave to appeal with this Honorable Court No. 101468. This petition was also denied, however, this Honorable Court entered a supervisory order instructing the Appellate Court to vacate their judgment and allow Petitioner to file an supplemental brief raising any issue(s) that he deems to be appropriate, with appropriate responsive briefing by appellee. In reconsideration its judgment, the Appellate Court is directed to consider all issues raised by appointed counsel and by pro-se Petitioner in resolving the appeal. (see Appendix B, exhibit 3)

Petitioner upon a order from the Appellate Court, filed his pro-se supplemental brief and reply brief upon the State's response brief. The Appellate Court denied the appeal and Petitioner filed a motion for rehearing which was also denied.

## 5. ARGUMENTS

1. WHETHER A FUNDAMENTAL MISCARRIAGE OF JUSTICE OCCURED WITHIN THIS CASE AT BAR, WHEN PETITIONER WAS CONVICTED AND SENTENCED FOR AN OFFENSE THAT HE IS ACTUALLY INNOCENT OF AND WHETHER THE SENTENCE IMPOSED UPON PETITIONER VIOLATES HIS CONSTITUTIONAL RIGHTS SECURED BY BOTH THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 11 OF THE ILLINOIS CONSTITUTION.

A fundamental miscarriage of justice occurs when "a Constitutional violation has probably resulted in a conviction of one who is actually innocent." McLaughlin v. Moore, 152 F.Supp.2d 123 at 127.

As this case at bar involves the offense of inducement to commit suicide (720 ILCS 5/12-31), an offense which has never been before this Honorable Court or any other court within this jursidiction, this is a case of first impression for the State of Illinois. Black's Law defines a case of first impression as "a case that presents the court with an issue of law that has not previously been decided by any controlling legal authority in that jursidiction."

In this case at bar, Petitioner, Thomas O'Farrell argues that not only is he actually innocent of the offense of first degree murder for which he was convicted and sentenced, Petitioner's conduct at worse constituted the offense of inducement to commit suicide (720 ILCS 5/12-31), under the statutory provision (a)(2)(ii), where Petitioner merely assisted his wife, Lesley Chapman-O'Farrell's suicide by intentionally participating in the physical act by which death occured (i.e. pulled the trigger, causing death).

Although a prototypical example of "actual innocence" is the case where the state has convicted the wrong person of the crime, one is also actually innocent if the state has the "right person", but he is not guilty of the crime with which he is charged. Moore, supra at 131-132.

Thirty-six states and terrotories currently have statutes imposing sanctions for aiding, assisting, causing, or promoting suicide.<sup>10</sup>



10. ALASKA STAT. § 11.41.120 (1989); \* \* \* ILL.REV.STAT. ch. 720 ¶5/12-31 (Westlaw 1996 \* \* \* . Compassion in dying v. State of Washington, 79 F.3d 790 at 847.

As Petitioner has pointed out, the State of Illinois is one of many states who have drafted and enacted a specific law imposing criminal sanctions for the act of assisting another person in the commission of their suicide. "Yet, no person has ever been charged under the inducement to commit suicide statute." "In fact, no person has ever endured criminal consequences for assisting a suicide in Illinois." (see exhibit 1, pg. 3)

The legislature is granted broad discretion in defining crimes and affixing their punishment. People v. Arna, 658 N.E.2d 445 at 449. The task of statutory construction as to ascertain and give effect to the intent of the legislature. Huff v. Rock Island, 689 N.E.2d 1159 at 1166. When the intentions of the legislature is clearly expressed, the plain meaning of the statute must be given effect. Rock Island, supra at 1166 and Sweger v. Chesney, 294 F.3d 506 at 516.

720 ILCS 5/12-31, inducement to commit suicide provides:

- (a) A person commits the offense of inducement to commit suicide when he or she does either of the following:
  - (1) Coerces another to commit suicide and the other person commits or attempts to commit suicide as a direct result of the coercion, and he or she exercises substantial control of the other person through (i) control of the other person's physical location or circumstances; (ii) use of psychological pressure; or (iii) use of actual or ostensible religious, political, social, philosophical or other principles.
  - (2) With knowledge that another person intends to commit or attempt to commit suicide, intentionally (i) offers and provides the physical means by which another person commits or attempts to commit suicide, or (ii) participates in a physical act by which another person commits or attempts to commit suicide.
- (b) Sentence. Inducement to commit suicide under paragraph (a)(1) when the other person commits suicide as a direct result of the coercion is a Class 2 felony.

Inducement to commit suicide under paragraph (a)(2) when the other person commits suicide as a direct result of the assistance provided is a Class 4 felony.

Petitioner takes the position that the 88th. General Assembly of the Illinois Legislature made their intentions extremely clear when they defined, drafted, and enacted the offense of inducement to commit suicide (720 ILCS 5/12-31, that the statute has (3) three separate statutory provisions for an offender to meet. However, the only provision that applies in this case at bar is the third provision, where the offender intentionally participates in the physical act by which the other person commits suicide. (e.i. causes the death of the other person). Here, one might either actually pull the trigger and shooting the person, injecting lethal drugs into the person, by suffercating the person with a pillow, or etc.

The new amendments within Public Act 88-392 § 5 (720 ILCS 5/12-31) were ment to keep Dr. Jack Kevorkian from coming to Illinois and committing the acts that he had committed elsewhere as well as criminalizing the actions by any other individual, such as Petitioner, in Illinois who may choose to emulate Dr. Kevorkian. (see exhibits 6-8 & 10) Dr. Kevorkian repeatedly assisted individuals in thier suicides by providing others with lethal drugs so that they may commit suicide. This action is a clear violation of the statutory provision (a)(2)(i) of 720 ILCS 5/12-31, where Dr. Kevorkian any provide the physical means. Kevorkian v. Thompson, 947 F.Supp. 1152. In People v. Kevorkian, 839 N.W.2d 291, Dr. Kevorkian went to the extreme of personally injecting the lethal drugs into Mr. Thomas Youk upon his request. This action is a clear violation of the statutory provison (a)(2)(ii) of 720 ILCS 5/12-31, where Dr. Kevorkian intentionally participated in the physical act by which Mr. Youk committed suicide.(i.e. injected the lethal drugs, causing

death.

Many other states such as California, Iowa, Indiana, Nebraska, New Mexico, Oklahoma, Oregon, and Texas have statutes criminalizing assisted suicide. However, none of the states mentioned have a statutory provision such as (a)(2)(ii) of 720 ILCS 5/12-31, where an individual intentionally participates in the physical act by which another person commits suicide. (see exhibits 11A-11G).

The Supreme Court has required a petitioner to support his allegation of Constitutional error with reliable evidence whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence that was not presented at trial. Chesney, supra at 523. The new facts need only raise sufficient doubt about petitioners guilt to undermine confidence in the result of the trial and to establish a threshold showing of innocence to justify a review of the merits of petitioner's Constitutional claims Cherrix v. Braxton, 131 F.Supp.2d 756 at 769.

In prosecutions for homicide where suicide of deceased is relied upon as a defense, the deceased's conduct, declarations, and threats indicating a suicidal disposition are generally admitted into evidence for the purpose of showing the deceased's state of mind or intentions. (40A Am.Jur.2d, Homicide § 287 (Suicide)).

Relying upon 40A Am.Jur.2d, Homicide §287 above, Petitioner would like to present substantial evidence which was omitted by trial counsel during Petitioner's proceedings which will prove the suicidal disposition of the victim, Lesley Chapman-O'Farrell. The evidence is as follows:

- 1) The victim, Lesley previously attempted suicide several times by either overdosing on her insulin, overdosing on her prescription medications, and trying to cut her wrist with a razor blade (see exhibits

2,3,4,9, & 12N); 2) The victim, Lesley continuously plead with her husband, Petitioner to help her end her life because she no longer wished to live with the pain that she was experiencing (see exhibit 9); and 3) The victim, Lesley told her family members only (5) five days prior to her death, that "I would rather die than to go through the rest of my life looking and feeling the way I do." (see exhibits 2,3,4).

Petitioner would like to note that each attempt at suicide above was thwarted by himself.

Petitioner would like to further the proof of the victim, Lesley's suicidal disposition by offering the following: The John Marshall Law Review, spring 1996 published an article outlining a profile of people who commit suicide. (see exhibit 5) This article along with the testimony of Dr. Larry Hienrich (Tr. K-59-K61) and the medical health services progress notes that were generated by Dr. Kenith L. Robins, Ph.D., the victim, Lesley's doctor will prove that the victim, Lesley definately had a suicidal disposition which could have been used as evidence during the proceedings.

Within Petitioner's confession, Petitioner stated that he believed that his wife, Lesley was terminally ill and that he assisted in Lesley's suicide upon her request. (Tr. I-153-156, I-182-187 and exhibit 19) Even Dr. Hienrich testified that he believed that Petitioner's actions was like a Dr. Kevorkian assisted suicide. (Tr. K-50)

Black's Law defines a mercy killing as "The affirmative act of bringing about immediate death allegedly in a painless way and generally administered by one who thinks that the dying person wishes to die because of a terminal or hopeless disease or condition." Black's Law also defines euthanasia as "The act or practice of killing or bringing

about the death of a person who suffers from an incurable disease or condition, esp. a painful one for reasons of mercy."

Petitioner believes that there can not be any doubt within this Honorable Courts mind after taking into consideration all the facts and evidence above that Petitioner believed that his wife, Lesley was terminally ill, that the victim, Lesley had several incurable and hopeless diseases, that the victim, Lesley was in pain and that Petitioner's actions were an assisted suicide, committed out of compassion and mercy for the wife he loves.

Petitioner believes that in light of the substantial evidence herein, Petitioner has raised more that a sufficient doubt of his guilt and a substantial showing of his innocence of the offense of first degree murder for which he was convicted and sentenced for. Petitioner firmly believes that no reasonable jury would have convicted him for the offense of first degree murder had they been presented with the evidence herein.

Where, Petitioner has clearly demonstrated that his actions on the morning of September 28, 1995, was at worse the offense of inducement to commit suicide under the statutory provision (a)(2)(ii) of 720 ILCS 5/12-31 which carries the sentence of 1-3 years, the sentence imposed upon Petitioner violates the Eighth Amendment of the United States Constitution as well as Article 1, Section 11 of the Illinois Constitution.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." (8th. Amend. U.S. Const.)  
"All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." (Art. 1, Sec. 11, Ill. Const.)

The Seventh Circuit has never expressly held that to be true, and decisions in other circuits suggest that "actual innocence" exception is available in non-capital cases. Indeed, this is the only reading that makes sense. How can it be unconstitutional to execute someone who is innocent, but constitutional to jail him? Moore, supra at 129.

2. WHETHER PETITIONER'S CONSTITUTIONAL RIGHT TO DUE PROCESS SECURED BY THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AS WELL AS ARTICLE 1, SECTION 2 OF THE ILLINOIS CONSTITUTION WERE SUBSTANTIALLY VIOLATED BY THE COOK COUNTY STATE'S ATTORNEY'S OFFICE WHERE THE PROSECUTION KNOWINGLY USED THE PERJURED TESTIMONY OF STATE'S WITNESS, THOMAS DYE DURING PETITIONER'S SENTENCING HEARING.

Perjury is committed when a witness "gives false testimony concerning a matter with the willful intent to provide false testimony, rather than as result of confusion, mistake, or faulty memory." United States v. Duggigan, 113 S.Ct. 1111 at 1116 and U.S. ex. rel. Washington v. Page, 981 F.Supp. 1097 at 1100.

In this case at bar, State's Witness, Thomas Dye testified during Petitioner's sentencing hearing on February 24, 1997. During the hearing, Mr. Dye testified that in January or February 1996, he had a conversation with Assistant State's Attorney, Patrick J. Quinn, a Supervisor of the Organized Crime Unit. (Tr. H-26-H-27 & H-37).

Within the deposition of State's witness, Thomas Dye in the case Steven Manning v. Thomas Dye, et. al., case # 02 C 0372, (see exhibit 17) Mr. Dye recounts the conversation (7½) seven and one half years earlier with Assistant State's Attorney Quinn (hereafter ASA Quinn). Within the Deposition on October 18, 2004, Mr. Dye admits that he was pressured by ASA Quinn to lie in this case at bar. (see exhibit 17, pg 3) Mr. Dye further admits that it was ASA Quinn who provided the motive that the Petitioner killed his wife, Lesley for financial gain and solely committed for insurance money (see exhibit 17, pg 2 & Tr. K-13-K15,

& K-19-K-21), That Petitioner used a derringer, that Petitioner placed the derringer into a pillow and shot his wife, Lesley in the head. (see exhibit 17, pg 5 & Tr. K-17-K-18). Mr. Dye testified within his deposition that ASA Quinn needed him to testify to the above facts because these facts were not included within Petitioner's confession. (see exhibit 17, pg 5)

ASA Quinn personally wrote Assistant State's Attorney, Jeff Kendall of the DuPage County State's Attorney's Office, who was prosecuting Mr. Dye for felony theft and requested that a deal be made for Mr. Dye to secure his testimony in this case at bar. (see exhibit 21) During Petitioner's sentencing hearing Mr. Dye testified that he was testifying in connection with a plea agreement of (4) four years incarceration for (3) three separate felony theft offenses and that per the agreement Mr. Dye was placed within the protective custody unit at the Illinois River Correctional Center. (Tr. K-9 & K-28)

The evidence above, alone is enough to prove Petitioner's claim that Mr. Dye was acting as a State agent, who recieved payment, not in money, but in a deal for the (4) four years and placement in the Illinois River, protective custody unit. But, most importantaly, the State prosecutor, namely ASA Quinn knowingly used perjured testimony during the Petitioner's sentencing hearing.

Deliberate deception of the court and jurors by the presentation of known false evidence will not be tolerated since it involves an affront to the rudimentary demands of justice. Giglio v. United States, 92 S.Ct. 763 and United States v. Marrero, 516 F.2d 12 at 14. The Supreme Court has "consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside. United States v. Aguas, 96 S.Ct. 2392. The governments use of perjured

testimony warranted a new trial. United States v. McLaughlin, 89 F.Supp. 2d 617 and United States v. Adcox, 19 F.3d 290 at 295.

Although, the perjured testimony of Thomas Dye did not occur until Petitioner's sentencing hearing and not the trial itself, Petitioner believes the same premise applies here as Petitioner's due process rights were still substantially violated by the perjury to warrant a new sentencing hearing without the tainted testimony of Mr. Dye.

3. WHETHER PETITIONER'S CONSTITUTIONAL RIGHTS SECURED BY BOTH THE UNITED STATES AND ILLINOIS CONSTITUTIONS UNDER THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS (U.S. CONST. 6th & 14th AMENDS AND ILL. CONST. ART. 1, SEC'S 2 & 8), WERE SUBSTANTIALLY VIOLATED BY TRIAL COUNSEL WHO FAILED TO DEVELOP AND PURSUE VIABLE TRIAL STRATEGIES WHICH WERE LOGICAL UNDER THE CIRCUMSTANCES OF THIS CASE AT BAR, BY EITHER PURSUING A LESSER OFFENSE AND/OR DEFENSE BASED UPON THE STATUTORY PROVISION (a)(2)(ii) OF 720 ILCS 5/12-31, INDUCEMENT TO COMMIT SUICIDE OR STATUTORY PROVISION (a)(1)(b) OF 720 ILCS 5/9-2, SECOND DEGREE MURDER.

Constitutionally, ineffective assistance of counsel is "cause". People v. Flores, 606 N.E.2d 1078 at 1085. "The attorney did not present any evidence and did not advance a theory of defense, this court held that, in this situation, prejudice would be presumed, and the defendant did not have to meet the Strickland standard. People v. Nieves, 737 N.E.2d 150 at 154.

In this case at bar, trial counsel was notified by both Petitioner and his family members prior to any pre-trial or trial proceedings of substantial evidence which is uncontradicted to support either a lesser offense and/or defense of the offense of inducement to commit suicide or second degree murder to the alternative first degree murder charges sought by the State. (see exhibits 2 ¶34, 3 ¶23, 4 ¶14 & 9 ¶5) Petitioner personally instructed trial counsel to pursue a second degree murder alternative. (see exhibit 9 ¶47)

Despite trial counsel being notified of this evidence, trial



counsel failed to utilize the evidence and ultimately failed to present any defense at all on Petitioner's behalf. (Tr. I-197-I-198).

"In all criminal prosecutions, the accused shall enjoy the right \* \* \* to have the Assistance of Counsel for his defense." (6th Amend. U.S. Const.) "In criminal prosecutions, the accused shall have the right to appear and defend in person and by counsel." (Art. 1, Sec. 8, Ill. Const.) "The lawyer-client relationship is one of trust and confidence. Such confidence only can be maintained if the lawyer acts competently and zealously pursues and clients' interest within the bounds of the law." (Preamble-Illinois Rules of Professional Conduct)

The evidence Petitioner relies upon for the lesser offense and/or defense of inducement to commit suicide is found within claim 1 herein. To support the lesser offense and/or defense of second degree murder, Petitioner relies on the following;

The second degree murder statute provides:

- (a) A person commits the offense of second degree murder when he or she commits the offense of first degree murder as defined in paragraph (1) or (2) of subsection (a) of Section 9-1 of the Code and either of the following mitigating factors are present:
  - (1) At the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by the individual killed or another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed; or
  - (b) Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.

Black's Law defines provocation as "The act of inciting another to do something; esp. to commit a crime. Something (such as words or actions) that affects a person's reason of self-control, esp. causing the person to commit a crime impulsively." The "sudden and intense passion resulting from serious provocation by the individual killed" (720 ILCS 5/9-2(a)(1) (West 1998) required for a finding of second degree murder did not necessarily have to be viewed in terms of

murder did not necessarily have to be viewed in terms of anger and violence, \* \* \* "sudden and intense passion" could be viewed in terms of sympathy and the desire to help a friend. Nieves, supra at 156.

It would be inconceivable to believe the continuous pleas from Petitioner's wife, Lesley to help end her life because she did not want to live with the pain, (see exhibit 9 ¶24) and watching the wife he loves live in pain while slowly succumbing to her illnesses could not, or did not, serve as a catalyst for Petitioner to want to end his wife, Lesley's pain or serve as the provocation to cause sudden and intense passion in Petitioner or any other reasonable person.

Petitioner recognizes the fact that this honorable Court only reconogizes the categories of serious provocation as substantial physical injury or assault, mutual quarrel or combat, illegal arrest, and adultery with the offender's spouse. People v. Chevalier, 131 Ill.2d 66 at 71 (1989). However, this Honorable Court also must recognize the fact that the 84th. General Assembly who drafted, defined and enacted the second degree murder statute in effect at the time of Petitioner's offense, never outlined any categories of serious provocation, they simply noted "serious provocation". (see exhibit 14 & 720 ILCS 5/9-2(a)(1)) Therefore, the plain language of the law must be given effect. Rock Island, supra at 1166 & Chesney, supra at 516.

Petitioner would like to address that although this Honorable Court has never had the opportunity to consider the actions of Petitioner as a sudden and intense passion resulting from a serious provocation, the Honorable Daniel Kelley of the Circuit Court of Cook County, Illinois has addressed conduct similar to Petitioners. Petitioner notes the case of People v. Williams, 638 N.E.2d 345 is only to show the similarties in conduct between Petitioner and Williams, not for use of

the ruling by the Appellate Court. In the case of Williams, Judge Kelley determined the actions of Williams, who shot his ailing wife, who was suffering from a disabling disease amounted to second degree murder. In doing so, Judge Kelley stated Williams was acting under "a sudden and intense passion, \* \* \* he was acting on years and years of living a difficult situation [and that this] was a stimulus provided for provocation." Williams, supra at 347.

As Petitioners conduct mirrors the conduct of Williams, under Article 1, Section 2 of the Illinois Constitution as well as the 14th Amendment of the United States Constitution, due process and equal protection clauses, Petitioner has the right to be treated the same as Williams and been afforded the same opportunity to a second degree murder defense as Williams. Once again Williams is only used as a comparision of the offense committed!

In this case at bar, trial counsel's failure to utilize the substantial evidence herein and develop a proper trial strategy reduced counsel's representation and the trial proceedings to a level of a sham and mockery. Trial counsel's failure and/or refusal to present said evidence indicates a fatalistic acceptance of Petitioner's guilt or a lack of faith in Petitioner and his witnesses credibilty, either of which fatally impairs any effective representation and its tantamount to no representation at all. Not to mention, it prejudiced Petitioner rights to appeal this meritorious claim further due to waiver and procedural default doctrines.

4. WHETHER PETITIONER'S CONSTITUTIONAL RIGHTS TO A FAIR AND IMPARTIAL TRIAL WHICH IS SECURED BY BOTH THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AS WELL AS ARTICLE 1, SECTION 8 OF THE ILLINOIS CONSTITUTION WERE SUBSTANTIALLY VIOLATED BY THE TRIAL JUDGE WHO FAILED TO RECUSE HIMSELF UNDER SUPREME COURT RULE 63, CANON 3(C)(1)(a), UPON RECEIVING AND READING EX PARTE COMMUNICATIONS INFORMING THE JUDGE OF SEVERAL DISPUTED EVIDENTIARY FACTS CONCERNING PETITIONER'S PROCEEDINGS AND PETITIONER'S PAST CRIMINAL HISTORY.

on, or about, September 23, 1996, prior to Petitioner's bench trial, the trial judge recieved and read ex parte communications, via a letter from Ms. Kathy Morris, who was a friend of the victim, Lesley Chapman-O'Farrell. (see exhibit 28, Tr. Sept. 27, 1996 & K-43-K45)

Ms. Morris' letter went into great detail describing disputed evidentiary facts surrounding this case at bar, many of which were never brought to light during Petitioner's proceedings. (see exhibit 28) Ms. Morris' letter also informed the trial judge about Petitioner's past criminal history with the same Area Five Detectives, who arrested Petitioner several years earlier for the offense of first degree murder.

Supreme Court Rule 63, Canon 3(C)(1)(a) states:

C. Disqualification.

- (1) A judge SHALL disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
  - (a) The judge has personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding.

In accordance with this Supreme Court Rule, the trial judge had a duty to preserve Petitioner's due process rights secured by the 14th Amendment of the United States Constitution and Article 1, Section 2 of the Illinois constitution to recuse himself from any further proceeding regarding this Petitioner, upon receiving and reading the ex parte communications (letter). This resulted in a undue prejudice. Black's Law defines undue prejudice as "the harm resulting from a trier of fact

being exposed to evidence that is persuasive but inadmissible such as evidence of prior criminal conduct or that so arouses the emotions that calm and logical reasoning is abandoned."

Pursuant to the Illinois Rules of Evidence, Petitioner's past criminal history would be admissible only if Petitioner had taken the stand to testify, and to a large extent it would have been inadmissible for impeachment purposes. However, Petitioner never took the stand to testify. (Tr. I-1-I-3)

5. WHETHER PETITIONER'S CONSTITUTIONAL RIGHTS TO A TRIAL BY JURY WHICH IS SECURED BY BOTH THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AS WELL AS ARTICLE 1 SECTION 8 OF THE ILLINOIS CONSTITUTION WERE SUBSTANTIALLY VIOLATED BY TRIAL COUNSEL WHO USED COERCIVE TACTICS AND FALSE PROMISES IN ORDER TO ACQUIESCE A JURY WAIVER FROM PETITIONER AND ALLOW PETITIONER TO PROCEED TO A BENCH TRIAL IN FRONT OF A JUDGE WHO WAS NOTIFIED OF DISPUTED EVIDENTIARY FACTS CONCERNING THE CASE AT BAR AND PETITIONER'S PAST CRIMINAL HISTORY.

On, or about, September 23, 1996, the trial judge received ex parte communications informing the judge of disputed evidentiary facts concerning the case at bar as well as Petitioner's past criminal history. (see claim 4 herein & exhibit 28)

On January 20, 1997, the evening before Petitioner's trial was scheduled to begin, trial counsel informed Petitioner that he (trial counsel) can not win. (see exhibit 9 ¶52) Trial counsel then employed coercive tactics and false promises of a (30) thirty years sentence if Petitioner waived a jury trial and proceeded to a bench trial in front of a judge who was fully aware of Petitioner's past criminal history as well as disputed evidentiary facts concerning this case at bar.

(see exhibits 9 ¶52 & 4 ¶11) Trial counsel guaranteed Petitioner the (30) thirty year sentence if he waived a jury trial and took a bench trial, (see exhibit 9 ¶52)

It is well established that a criminal attorney can not make promises or guarantees concerning the outcome of judicial proceedings. (see Rule 8.4(4) & (6) of the Rule of Professional Conduct (West 2005))

If in fact there was an agreement between the defendant's attorney, the prosecutor and the judge that the defendant would receive a sentence of 14 years, the judgment entered upon can not stand. People v. Washington, 232 N.E.2d 738 at 740.

A criminal defendant has a constitutional right to expect during trial that his attorney will, at all times, support him, never desert him, and will perform with the reasonable competence and diligence. Jemison v. Foltz, 672 F.Supp. 1002 at 1009.

Trial counsel waived a jury trial and allowed defendant to be tried before a judge that was fully aware of defendant's long criminal history, compounded with numerous other errors, constitutes ineffective assistance of counsel. Foltz, supra at 1002.

On January 20, 1997, trial counsel informed Petitioner that if he did not take a bench trial, the judge would give him all (60) years. (see exhibit 9 ¶52) Trial counsel's erroneous advise that defendant would receive a sentence six times greater if he proceeded to trial constitutes ineffective assistance of counsel and renders the guilty plea invalid. Cook v. U.S., 461 F.2d 530 Trial counsel lied to defendant to induce a guilty plea, constitutes ineffective assistance of counsel. U.S. v. Giardino, 797 F.2d 30

Although, Cook, Giardino and Washington, supra are cases where a guilty plea occurred, Petitioner firmly believes that the same principle applies here, as Petitioner was guaranteed a thirty year sentence if he waived a jury trial, Petitioner was threatened with sixty years if he proceeded to a jury trial.

proceeded to a jury trial, Petitioner was coerced into signing a jury waiver and Petitioner was denied his Constitutional Right to a trial before a fair and impartial jury, a right that is secured by both Constitutions.

It should be noted that even though the trial court asked Petitioner if he understood the rights and consequences of signing the jury waiver, the trial court never asked Petitioner if he had been promised anything or was coerced into signing the waiver. (Tr. I-2-I-4).

6. WHETHER PETITIONER'S CONSTITUTIONAL RIGHTS SECURED BY THE 5th, 6th & 14th AMENDMENTS OF THE UNITED STATES CONSTITUTION AS WELL AS ARTICLE 1, SECTIONS 2, 8 & 10 OF THE ILLINOIS CONSTITUTION WERE SUBSTANTIALLY VIOLATED BY TRIAL COUNSEL AND POLICE WHERE TRIAL COUNSEL FAILED TO PRESENT DIRECT EVIDENCE DURING THE SUPPRESSION HEARING THAT CORROBORATED PETITIONERS CLAIM THAT DETECTIVE SCHAKS TREAT TO HAVE PETITIONER'S SON TAKEN BY THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES IF PETITIONER DID NOT COOPERATE AND GIVE AN INCRIMINATING STATEMENT. (Tr. A-44,45)

"No person shall \* \* \* be compelled in any criminal case to be a witness against himself." (U.S. Const. 5th Amend.) "No person shall be compelled in a criminal case to give evidence against himself." (Ill. Const., Art. 1, Sec. 10)

In determining whether defendants confession was voluntary, the court must consider the totality of the circumstances. People v. Strong, 737 N.E.2d 687 at 692. The ultimate test of voluntariness is whether the defendant made the statement freely, voluntary, and without compulsion or inducement of any sort, or whether the defendants will was overcome. In re G.O., 727 N.E.2d at 1012 & Strong, supra at 692. The admission of an involuntary confession is unlikely to be harmless given the heavy weight typically accorded confessions by the trier of fact. Colorado v. Connelly, 107 S.Ct. 515 & Strong, supra at 693.

In addition to the evidence presented during the hearing, Petitioner also relays upon the direct evidence and credible witnesses

trial counsel was made aware of by Petitioner and his family members that would prove Petitioner's claim that police used coercive tactics. (see exhibits 2 ¶34, 3 ¶23, 4 ¶14, 9 ¶5 & 13 ¶10) Trial counsel was personally notified that Petitioner had prior experience with the same Area 5 detectives, who falsely arrested Petitioner for the offense of first degree murder, who attempted to coerce Petitioner into giving an incriminating statement by withholding food from him for (24) hours. (see exhibits 9 ¶9 & 13, 18 ¶6), that it was not within Petitioner's nature to cooperate with the police or give an incriminating statement, without requesting counsel and invoking his right to remain silent (see exhibits 9 ¶10 & 11, 2 ¶30-32 & 18 ¶7), that Petitioner's son was present at Area 5 when Detective Schak threatened to take Petitioner's son and give him to the DCFS if Petitioner did not cooperate (see exhibits 9 ¶37, 2 ¶'s 14 & 18 20-21, 3 ¶ 16-17, 4 ¶8-9, 13 ¶6-7 & Tr. E-45-47), that Detective Schak was present during the questioning of Petitioner by ASA Kuogias and Petitioner was unable to speak freely to ASA Kuogias about the threat of DCFS by Detective Schak (see exhibit 9 ¶39 & Tr. A-99, I-156, I-182 and Strong, supra at 693, and that Petitioner stopped cooperating with Detective Schak & ASA Kuogias upon being informed that Petitioner's son was removed from Area 5 and was safe with family members. (see exhibits 9 ¶40, 2 ¶ 15, 18, 20-21, 3 ¶16-17, 4 ¶8-9 & 13 ¶6-7 & Tr. E-45-47).

Trial counsel's omissions and/or failure to utilize said evidence and witnesses indicates a fatalistic acceptance of Petitioner's guilt or a lack of faith in Petitioner and his witnesses credibility, either of which fatally impairs any effective representation and is tantamount to no representation at all, not to mention the prejudice caused by trial counsel's failure to present and preserve the claim and it's evidence



for further review in Petitioner's appeal process. The actions and/or inactions of trial counsel during the hearing clearly violated Petitioner's rights to effective assistance of counsel and due process under the 6th & 14th Amendments of the United States Constitution as well as Article 1, Sections 2 & 8 of the Illinois Constitution.

7. WHETHER PETITIONER'S CONSTITUTIONAL RIGHTS SECURED BY THE 6TH & 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION AS WELL AS ARTICLE 1, SECTION'S 2 & 8 OF THE ILLINOIS CONSTITUTION UNDER THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS WERE SUBSTANTIALLY VIOLATED BY DIRECT APPEAL COUNSEL, WHO FAILED TO INCORPORATE WITHIN PETITIONER'S APPEAL BRIEF THE CLAIMS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL HEREIN THIS PETITION TO PRESERVE FURTHER REVIEW.

Due process guarantees defendants the right to effective assistance of counsel on first direct appeal. Evitts v. Lucy, 105 S.Ct. 830 & Page v. Frank, 343 F.3d 901 at 909. Appellate counsel's failure to raise clearly meritorious issues on direct appeal constitutes ineffective assistance. Banks v. Reynolds, 54 F.3d 1508 at 1515-1516 Constitutionally, ineffective assistance of counsel is "cause". People v. Flores, 606 N.E.2d 1078 at 1085 When a defendant is constructively denied his rights to counsel on appeal by counsel's actions, then prejudice is presumed. Lofton v. Whitley, 905 F.2d 885 Appellate counsel's failure to present issues, on direct appeal \* \* \* prejudiced defendant where counsel's failure prevented defendant from presenting issue for discretionary review to the United States Court. Freeman v. Lane, 962 F.2d 1252.

Petitioner informed direct appeal counsel that he wished to raise many issues of ineffective assistance of counsel against trial counsel. (see exhibit 23) However, after Petitioner personally spoke with counsel in length about his ineffective assistance claims against trial counsel, direct appeal counsel informed Petitioner that the record did

not reflect any ineffectiveness and that Petitioner can raise the claims within his post-conviction petition. (see exhibit 24)

In light of the legal advise provided to Petitioner by direct appeal counsel, Petitioner made a reasonable and diligent attempt to pursue the ineffective assistance of trial counsel within his original pro-se post-conviction petition, which was filed in the circuit court on January 26, 2000. (see the exhibit attached and incorporated within Petitioner's petition for rehearing, case #1-04-2481) Said petition survived the first stage of the post-conviction proceedings and Judge Thomas R. Fitzgerald, Presiding Judge of the Criminal Division of the Circuit court of Cook County appointed pro bono counsel. (see exhibit 15 as well as claim 8 herein) Thus, any issue to be reviewed must be presented in the petition filed in the circuit court. People v. Jones, 809 N.E.2d 1233 at 1239 Under 725 ILCS 5/122-3 of the post-conviction hearing act "Any claims of substantial denial of Constitutional rights not raised in the original or amended petition is waived." As the original petition was filed within the circuit court and said issues were contained within said original petition, the claims were not waived.

The Appellate Court supports Petitioner's claim of ineffective assistance of direct appeal counsel within it's orders. The Appellate Court stated Petitioner's claims of ineffective assistance of trial counsel were waived because these issues were capable of being raised on direct appeal. (see appendix B-1 & B-2, pg.'s 13) Petitioner notes that the failure to raise the ineffective assistance of trial counsel within his direct appeal brief was not due to his culpable negligence, as Petitioner did everything within his power by writing and discussing the claims herein with direct appeal counsel. It was direct appeal counsel who gave Petitioner fatalistic legal advise and failed to raise these

meritorious claims that were capable of being raise, as per the Appellate Courts orders above.

8. WHETHER PETITIONER WAS DENIED THE REQUIRED LEVEL OF ASSISTANCE OF COUNSEL IN VIOLATION OF ILLINOIS SUPREME COURT RULE 651(c), WHERE APPELLATE COUNSEL REMOVED PETITIONER'S ORIGINAL PRO-SE POST-CONVICTION PETITION WHICH CONTAINED PETITIONER'S CONTENTIONS REGARDING MERITORIOUS CLAIMS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL WITHOUT PETITIONER'S AUTHORITY AFTER THE PETITION SURVIVED THE FIRST STAGE OF THE POST-CONVICTION PROCEEDINGS AND WAS DOCKETED FOR FURTHER DETERMINATION IN THE SECOND STAGE.

On January 26, 2000, Petitioner's original pro-se post-conviction petition which contained meritorious claims of ineffective assistance of trial counsel was filed by the Clerk of the Circuit Court of Cook County, Illinois. (see exhibit attached and incorporated within the petition for rehearing filed, case #1-04-2481) The original petition filed by Petitioner survived the first stage of the post-conviction proceedings and Thomas R. Fitzgerald, Presiding Judge of the Criminal Division of the Circuit Court of Cook County, Illinois docketed the original petition for further determination in the second stage and pro-bono counsel was appointed. (see exhibit 15)

At the second stage of post-conviction proceedings, which commences if and when the petition for post-conviction relief is docket for further consideration, having survived an initial examination for frivolity, the trial court must determine whether the petition and any accompanying documents substantially show any constitutional violation. People v. Sawczenko, 767 N.E.2d 519 at 524. Any claim within Petitioner's original petition which survived the 90-day period are preserved for further review.

Supreme Court Rule 651(c) clearly states that counsel must consult with petitioner either by mail or in person to ascertain his contentions regarding the deprivation of his constitutional rights,

that counsel examine the record of proceedings at trial, and that counsel has made any amendments to the petition filed pro-se that are necessary for an adequate presentation of petitioner's contentions. People v. Jones, 522 N.E.2d 1325 at 1329, People v. Porter, 521 N.E.2d 1158 at 1160 & People v. Vasquez, 824 N.E.2d 1071 at 1075. It was further ruled that compliance with the duties set forth in this Rule is MANDATORY. Vasquez, supra at 1075. The purpose of the appointed post-conviction attorney is to take a pro-se petition and ensure that it adequately presents the claims that petitioner wishes to make. People v. Brown, 808 N.E.2d 1113 at 1117. The right to defend is given directly to the accused; for it is he who suffers the consequences if it fails. Faretta v. California, 95 S.Ct. 2525 at 2533.

Petitioner made his contentions regarding his original pro-se post-conviction filed very clear to appellate counsel in person during an attorney visit, in writing and by telephone, that appellate counsel was not given Petitioner's authority to remove his original pro-se petition and/or any issue contained therein said petition and that the amended and amendment to the amended petition were to be in addition to Petitioner's original pro-se petition already filed. (see exhibits 29-34)

Dispite Petitioner's wishes, appellate counsel blatantly disregarded Petitioner's contentions and went behind Petitioner's back without his knowledge and before Judge William S. Wood on April 12, 2001 filed a motion to withdraw appeal (petitioner's original pro-se petition) either in writing or a verbal motion, (see exhibit 35 pg 11) removing the original pro-se petition and all of it's meritorious claims.

The actions and/or inactions of appellate counsel during the post-conviction proceedings clearly prejudiced Petitioner as the Appellate Court stated "Where an amended pleading is complete in itself and does

not refer to or adopt the prior pleading, the earlier pleading ceases to be part of the record for the most purpose and is effectively abandoned and withdrawn." (see appendix B, exhibits 1-13 & 2-13)

"Next, because he failed to include it in his amended post-conviction petition, defendant has waived the claim that he was subject to the ineffective assistance of trial counsel" (see appendix 2, exhibits 1-14 & 2-14). This conduct of appellate counsel clearly violates Supreme Court Rule 651(c), as counsel ignored Petitioner's contentions by removing his original pro-se petition without his authority, barring further review of the meritorious claims in a higher court, which constitutes a violation of due process.

9. WHETHER THE APPELLATE COURT ERRED, DENYING PETITIONER'S  
CONSTITUTIONAL RIGHT TO DUE PROCESS SECURED BY BOTH THE  
UNITED STATES AND ILLINOIS CONSTITUTIONS.

As Petitioner is limited to a total number of pages for this petition for leave to appeal, and the Appellate Courts errors are many, Petitioner wishes to incorporate the arguments that were contained within his petition for rehearing which was filed and subsequently denied in the Appellate Court within this claim. (see Appendix B, exhibit 4)

In addition to the arguments contained within Petitioner's petition for rehearing, Petitioner wishes to further address the 651(c) violation, as the Appellate Court in it's modified order upon denial of petition for rehearing made additional errors. (see appendix B, exhibit 4, pg 19-20)

The Appellate Court stated "a careful review of the record reveals that defendant has misconstrued the record and the motion he claims was erroneously made does not exist. Post-conviction counsel did not withdraw defendant's por-se petition; rather, post-conviction counsel

failed to incorporate the pro-se allegations into her amended petition. This may be a distinction without difference, from defendant's perspective. Nevertheless, defendant misreads the record, and the motion he claims was made in the trial court was actually made in this court and was a motion to withdraw an earlier appeal." (see appendix B, exhibit 4, pg 19) However, this ruling is an error in two parts. First, as this Honorable Court may see in exhibit 35, on 04/21/01 a "special order" was entered in Petitioner's case. The order allowed appellant's motion to withdraw appeal, which was filed by appellate counsel, without Petitioner in court. This motion to withdraw appeal was before the Honorable William S. Wood. However, exhibit 35 does not state if this motion was an oral or written motion, but it does state there in fact was a motion allowed.

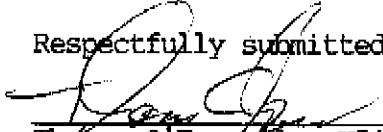
The second error occurred when the Appellate Court failed to properly view exhibit 35 and the date in which the motion to withdraw appeal was allowed. The Appellate Court erred by mistaking a motion filed in the Circuit Court of Cook County, Illinois with a motion to dismiss appeal in case #1-03-2619 and a motion to dismiss appeal as moot in case #1-03-3404 which were filed and granted by the Appellate Court, to allow Petitioner to appeal case # 1-04-2481 which was granted by the Appellate Court upon Petitioner filing a late notice of appeal. (see Appendix B, exhibits 5-6) The Appellate Court clearly erred as the motion to withdraw appeal, Petitioner is referring to occurred on April 12, 2001 and the motions the Appellate Court is referring to occurred in March or April 2004, (3) years after the motion Petitioner is referring to was allowed.

Again, Petitioner relies upon the arguments contained within his petition for rehearing to demonstrate the Appellate Courts errors.

6. CONCLUSION

Based upon the foregoing argument, Petitioner prays that this Honorable Court will grant him leave to appeal so that the questions herein will be addressed or grant any other relief this Honorable Court deems appropriate.

Respectfully submitted, ~



---

Thomas O'Farrell - K54340,  
Pro-Se Petitioner  
P.O. Box 99  
Pontiac, Illinois 61764

APPENDIX A

<u>EXHIBIT #'S</u>	<u>PAGES</u>
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#2-Affidavit-Thomas C. O'Farrell (Petitioner's father)	1-7
#3-Affidavit-Mary A. O'Farrell	1-4
#4-Affidavit-Colleen E. Kohn	1-3
#5-Article-John Marshall Law Review	1-5
#6-Public Act 86-980	1
#7-Public Act 87-1167	1
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#9-Affidavit-Thomas F. O'Farrell (Petitioner)	1-8
#10-Transcriptions-88th General Assembly	1-10
#11-Statutes from the States of Ca., Ia., In., Ne., N.M., Ok., & Tx.	A-G
#12-The victim, Lesley Chapman-O'Farrell's mental health services progress notes	A-P
#13-Affidavit-John Kohn	1-2
#14-Transcriptions-84th General Assembly	1-8
#15-Letter from Chicago Counsel of Lawyers to Atty. Gubin	1
#16-Affidavit-Joseph Wayda	1-2
#17-Deposition of Thomas Michael Dye	1-6
#18-Affidavit-Attorney Michael A. Pedicone	1
#19-Supplementary report-Chicago Police Department	1-8
#20-State's Attorney's answer to discovery	1-5
#21-Letter to A.S.A. Jeff Kendall, DuPage County State's Atty. from A.S.A. Patrick J. Quinn, Supervisor-Organized Crime Unit	1
#22-Affidavit-Jose Flecha	1-2
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#25-People v. Williams, 638 N.E.2d 345	1-4
#26-Legal Document for the Estate of the victim, Lesley Chapman-O'Farrell	1
#27-Death Certificate of the victim, Lesley Chapman-O'Farrell	1
#28-Letter to the Honorable Michael P. Toomin from Kathy Morris	1-3
#29-Letter to Attorney Gubin from Petitioner	1-2
#30-Affidavit-Thomas O'Farrell (Petitioner)	1
#31-Authorization form by Petitioner to Atty. Gubin	1
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#33-Affidavit-Thomas O'Farrell (Petitioner)	1
#34-Affidavit-Inmate John Turpen	1
#35-Certified Statement of Conviction/Disposition generated by Dorothy Brown, Clerk of the Circuit Court of Cook County, Illinois in the case People v. O'Farrell, #95 CR 3046301	1

APPENDIX B

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~~Westlaw~~

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(Cite as: 226 Ill.2d 601)

People v. O'Farrell

Ill. 2007.

(The decision of the Court is referenced in the  
North Eastern Reporter in a table captioned

"Supreme Court of Illinois Dispositions of Petitions  
for Leave to Appeal".)

Supreme Court of Illinois

People

v.

Thomas O'Farrell

NO. 105256

NOVEMBER TERM, 2007

November 29, 2007

Lower Court: No. 1-04-2481

Disposition: Denied.

Ill. 2007.

People v. O'Farrell

226 Ill.2d 601, 879 N.E.2d 936 (Table), 316

Ill.Dec. 548

END OF DOCUMENT

CASE NO. 08CV2403

ATTACHMENT NO. 2<sup>(EXHIBITS A-DD)</sup>

EXHIBIT \_\_\_\_\_

TAB (DESCRIPTION) \_\_\_\_\_



RECEIVED

MAY 27 2003

CLERK OF THE CIRCUIT COURT  
CRIMINAL DIVISION

STATE OF ILLINOIS )  
 ) ss  
COUNTY OF LIVINGSTON)

DOWNTOWN  
CLERK OF THE CIRCUIT COURT

IN THE CIRCUIT COURT OF COOK COUNTY  
COUNTY DEPARTMENT - CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS, )  
Plaintiff-Respondent, )

v. )

THOMAS O'FARRELL, )  
Defendant-Petitioner, )

Case No. 95 CR 3046301

Judge \_\_\_\_\_

PETITION FOR POST-CONVICTION RELIEF

NOW COMES, Petitioner, Thomas O'Farrell, Pro-Se, pursuant to Chapter 725 ILCS 5/122-1 Et. Seq. of the Illinois Compiled Statutes, hereby respectfully requesting that this Honorable Court to grant him post-conviction relief. In support of said request, Petitioner states the following:

1) On September 28, 1995, Petitioner was charged with two counts of first degree murder -- by superceding indictment -- in the shooting death of his wife, Lesley Chapman-O'Farrell.

2) On January 21, 1997, following a bench trial, Petitioner was convicted of count 1 of the indictment. Count 2 was merged into count 1.

3) On February 28, 1997, Petitioner was sentenced to a term of fifty (50) years in the Illinois Department of Corrections.

4) On March 24, 1999, the Illinois Appellate Court, First Judicial District, affirmed Petitioner's conviction and modified the sentence.

5) Petitioner was subsequently denied leave to appeal to the Illinois Supreme Court.

6) On January 25, 2000, Petitioner filed his original petition for post-conviction relief in this Court. (see Exhibit A attached and incorporated herein by and with this reference)

7) Petitioner's original post-conviction petition survived the 90-day dismissal period in its entirety, and counsel was appointed.

8) On April 13, 2001, appellate counsel filed her amended post-conviction petition, and removed Petitioner's original petition, foreclosing review of several substantial claims raised within the petition. (see Exhibit B & C attached and incorporated herein by and with this reference)

9) On October 4, 2001, this Honorable Court granted the State's motion to dismiss the amended petition.

CAUSE AND PREJUDICE

10) As stated above, Petitioner has previously filed a petition for post-conviction relief. (see Exhibit A)

11) Petitioner contends that he meets the criteria for filing a successive post-conviction petition announced by the Illinois Supreme Court in People v. Pitsonbarger, \_\_\_\_ Ill.2d. \_\_\_\_, (2002), 2002 WL 1038729 (Ill. 2002).

12) In Pitsonbarger, the Court held that in order for a defendant to file a second petition under the Illinois Post-Conviction Hearing Act, he must demonstrate "Cause" for his failure to raise the issue in his original post-conviction petition.

13) That is, a defendant attempting to raise a claim in a successive post-conviction petition must show that some external

factor impeded his ability to raise the claim in a previous post-conviction proceeding.

14) Once a defendant has demonstrated "Cause", he must then demonstrate that "Prejudice" has or will ineluctably accrue from the Court's failure to address the merits of the claim.

15) Petitioner contends that cause is easily demonstrated.

16) The issues Petitioner is seeking to raise were contained within his original post-conviction petition. (see Exhibit A)

17) The issues survived the 90-day dismissal period, indicating that they were not frivolous or patently without merit.

18) Appellate Counsel, Deborah J. Gubin failed to contain the issues in her amended petition, although Petitioner instructed counsel not to remove any issue from his petition. (see Exhibits D & E attached and incorporated herein by and with this reference)

19) Because the issues removed by counsel had been deemed meritorious by this Honorable Court, counsel's failure to include the issues within her amended petition constitutes cause within the meaning of the holding in Pitsonbarger.

20) Perjudice, within the meaning of the Pitsonbarger decision, is demonstrated by the fact that the failure of Judge Michael P. Toomin to address the merits of the claims contained herein will result in the issues being procedurally defaulted for purposes of habeas corpus. This will preclude Petitioner from seeking Federal Review of the claims.

21) Moreover, because Petitioner has no Sixth Amendment Right to the effective assistance of post-conviction counsel,

prejudice will ineluctably accrue if Petitioner is required to bear the burden of counsel's deficient performance, when the deficiencies rise to the level of a Sixth Amendment Right.

22) In other words, requiring Petitioner to bear the burden of counsel's deficient performance simply because there is no Constitutional Amendment governing counsel's performance is in itself highly prejudicial.

#### ISSUES PRESENTED FOR REVIEW

##### CLAIM ONE

23) Petitioner was denied the effective assistance of counsel, in violation of the Sixth Amendment, where trial counsel failed to present additional evidence during a suppression hearing to prove Petitioner's confession was illegally obtained.

24) Following Petitioner's arraignment, trial counsel filed a motion to suppress several pieces of physical evidence as well as Petitioner's statement to the police.

25) During the hearing, trial counsel failed to present evidence that would have substantially diminished the credibility of the arresting detectives; and would have served to prove that psychological coercion had been used to obtain a confession. (see Exhibit A's exhibit's 2,3,4,9, & 13 attached and incorporated herein by and with this reference)

26) Trial counsel failed to inform the Trial Court that on a previous arrest, the same Area Five Detectives withheld food from Petitioner for 24 hours in an pitiful attempt to coerce a confession. (see Exhibit A's exhibit's 9 & 18 attached and incorporated herein by and with this reference)



27) Trial counsel failed to present the testimony of Petitioner's father, Thomas C. O'Farrell, a retired police officer, who would have testified that Petitioner, after being informed that his son, LeRoi was no longer at the Area Five Police Station, Petitioner again demanded to have counsel present during questioning. (see Exhibit A's exhibit's 2,3,4,9, & 13)

28) Trial counsel failed to inform the Trial Court that Petitioner was being denied medication to treat the pain of his gunshot wound, until he cooperated with detectives. (see Exhibit A's exhibit's 2 & 9)

29) Trial counsel failed to adequately refute the State's claim that the confession was voluntary. Assistant State's Attorney, Kougias testified that Petitioner invoked his right to counsel after making an oral confession, but before being requested to sign the written statement. (Tr. E57) It is inconceivable to believe that a suspect who is voluntarily assisting police would do such. Moreover, the fact that Petitioner's adamant demand for counsel came after he was informed that his son was no longer at the police station, has to be viewed by this Honorable Court as more than coincidental.

#### CLAIM TWO

30) Appellate counsel, Deborah J. Gubin was grossly inadequate, in violation of Illinois Supreme Court Rule 651(c), where she failed to include in her amended petition that Petitioner's conviction for first degree murder should be reversed where Petitioner met his burden of proving that he acted under a sudden and intense passion resulting from serious

provocation pursuant to Ill. Rev. Stat. 720 ILCS 5/9-2.(1) and (2)(b) - second degree murder.

31) On April 11, 2001, a telephone conversation was had between Petitioner and Appellate Counsel, Deborah J. Gubin. (see Exhibit E)

32) During this conversation, Petitioner insisted that appellate counsel raised the instant claim in her amended petition. (Although Petitioner referred to the issue as a "legal innocence" claim). Appellate counsel agreed to raise the claim. (see Exhibit E)

33) It is obvious that appellate counsel intentionally deceived Petitioner, as the issue was not contained in her amended post-conviction petition. (see Exhibit B)

34) Petitioner stood a substantial likelihood of success on the merits of the claim.

35) The facts of Petitioner's case are analogous to People v. Williams, 265 Ill. App.3d 283, 438 N.E.2d 345 (1st Dist.1994).

36) Under the Illinois Constitution, Article 1 Section 2 and the United States Constitution, Amendment 14 Section 1's Due Process and Equal Protection Clauses, "Similar situated persons have a right to be treated in a similar manner".

37) In Williams, defendant was charged with first degree murder in the shooting death of his ailing wife as this Petitioner.

38) Following a bench trial, defendant was convicted of second degree murder.

39) In so doing, the Court stated that defendant acted under "A sudden and intense passion, \* \* \* he was acting on years and

years of living a difficult situation [and that this] was a stimulus provided for the provocation.

40) In this case at bar, Petitioner lived with his wife's debilitating illness for a prolonged period of time, serving as her sole care provider.

41) It would be inconceivable to believe that watching his wife live in pain while slowly succumbing to her illness could not, or did not, served as a catalyst for Petitioner to want to end her pain.

42) Moreover, Petitioner's wife had actually tried to take her own life on several occasions, and would have been successful had Petitioner not intervened. (see Exhibit A's exhibit's 2,3,4, and 9)

43) On September 23, 1995, five days prior to Petitioner's wife's death, Petitioner's wife informed her family members that "I would rather die than to go through the rest of my life looking and feeling the way I do (regarding the paralysis to her right side of her face and the pain in her head)." (see Exhibit A's exhibit's 2,3, and 4)

44) As in Williams, Petitioner was acting under a sudden and intense passion resulting from the stimulus above providing for Petitioner's provocation. (Ill. Rev. Stat. 720 ILCS 5/9-2.(1).

45) Serious provocation is conduct sufficient to excite an intense passion in a reasonable person. (Ill. Rev. Stat. 720 ILCS 5/9-2.(2)(b).

46) Petitioner's actions were as a Doctor Kevorkian assisted suicide and Petitioner was acting under an extreme mental and

emotional disturbance at the time of the offense. (see Tr.K50 and Exhibit A's exhibit 19 attached and incorporated herein by and with this reference)

47) The Honorable Michael P. Toomin who presided as the trier of fact in Petitioner's bench trial found that there was physical evidence that corroborates the second version (assisted suicide) gave to the Area Five Detectives on September 28, 1995 by Petitioner. (Tr.I208)

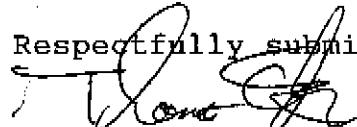
48) Wherefore, based on the foregoing, Petitioner has the Constitutional Right secured by both the Illinois and United States Constitutions under the Due Process and Equal Protection Clauses to be treated as Williams.

### CLAIM THREE

49) Appellate counsel was grossly inadequate, in direct violation of Illinois Supreme Court Rule 651(c), where she failed to perfect a timely notice of appeal following dismissal of Petitioner's original post-conviction petition, after being instructed to do so by Petitioner. (see Exhibit F attached)

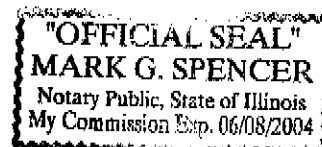
50) Wherefore, based on the foregoing, Petitioner prays that this Honorable Court 1) Allow Petitioner to proceed with the instant post-conviction petition; and 2) Grant post-conviction relief as necessary to insure the ends of justice.

Respectfully submitted,

  
Thomas O'Farrell, Pro-Se,  
Defendant-Petitioner

Subscribed and Sworn to before me  
on this 19 day of May, 2003.

  
Notary Public



RECEIVED

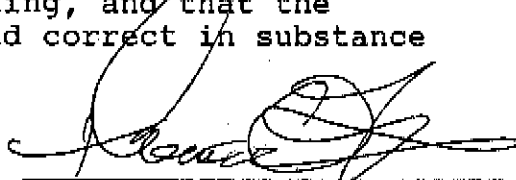
MAY 27 2003

CLERK OF THE CIRCUIT COURT  
CRIMINAL DIVISION


STATE OF ILLINOIS )  
 ) ss  
COUNTY OF LIVINGSTON )

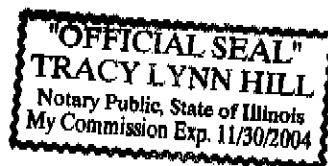
AFFIDAVIT OF THOMAS O'FARRELL

I, Thomas O'Farrell, Defendant-Petitioner, Pro-se.  
first being duly Sworn on oath, deposes and says that as to  
the matters herein this post-conviction petition, he is the  
Defendant-Petitioner in the above entitled cause, that he has  
read the forgoing document, by him signing, and that the  
statements contained herein are true and correct in substance  
and in fact.

  
Thomas O'Farrell, Pro-se  
Defendant-Petitioner

Subscribed and Sworn to before me  
on this 7 day of May, 2003.

  
Notary Public



25

STATE OF ILLINOIS     )  
                              ) ss  
COUNTY OF COOK        )

AFFIDAVIT OF THOMAS C. O'FARRELL

I, Thomas C. O'Farrell, hereby certify under penalty of perjury and as otherwise provided by law that the information and statements below are true and correct to the best of my knowledge:

1) I am sixty four (64) years of age and reside in the State of Illinois, Cook County, at 11445 So. Mather Ave., Alsip, Illinois 60803.


2) I am, Subject to rule of admissibility, competent to testify to the matters herein.

3) The Defendant in this cause, Thomas O'Farrell, is my son.

4) My son Thomas is dyslexic and required special education classes during his grammar and high school years.

Further affiant sayeth nought.

Subscribed and Sworn to before me on  
this 9<sup>th</sup> day of May, 2003.

  
Notary Public



  
Thomas C. O'Farrell

STATE OF ILLINOIS     )  
                              )ss  
COUNTY OF LIVINGSTON)

AFFIDAVIT OF MICHAEL SAPP

I, Michael Sapp, hereby certify under penalty of perjury and as otherwise provided by law that the information and statements below are true and correct to the best of my knowledge;

1) I am presently incarcerated in the Illinois Department of Correction at the Pontiac Correctional Center, Pontiac, Illinois 61764, under the I.D. #K56211.

2) I have a certain knowledge of the law and the court proceedings.

3) Thomas O'Farrell also is incarcerated here at the Pontiac Correctional Center.

4) ~~Thomas O'Farrell is the Defendant in the case of the~~ Thomas O'Farrell is the Defendant in the case of the People of the State of Illinois v. Thomas O'Farrell, case number 95 CR 3046301.

5) Thomas O'Farrell is a severe dyslexic and has a hard time reading, writing and has a hard time comprehending the things he reads.

6) Thomas O'Farrell enlisted me to research and compile a post-conviction petition in his behalf.

7) I have read the post-conviction petition to Thomas O'Farrell and can attest that he understands the issues and arguments that I have brought to this Honorable Courts attention.

8) Thomas O'Farrell by signing said post-conviction petition and affidavit gives me the authority to file said petition.

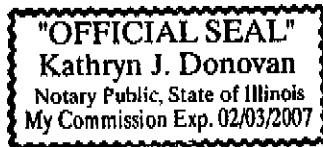
9) I am, subject to the rules of admissibility, competent to testify to the matters herein.

Further affiant sayeth nought.

  
Michael Sapp-K56211

Subscribed and Sworn to before me  
on this 9th day of May, 2003.

  
Notary Public







STATE OF ILLINOIS )  
 ) ss  
COUNTY OF COOK )

IN THE CIRCUIT COURT OF COOK COUNTY  
COUNTY DEPARTMENT - CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS, )  
Plaintiff-Respondent, )  
 ) CASE NO. 95 CR 3046301  
v. )  
 ) JUDGE \_\_\_\_\_  
THOMAS O'FARRELL, )  
Defendant-Petitioner, )

MOTION FOR DIFFERENT JUDGE TO CONSIDER

NOW COMES, Defendant, Thomas O'Farrell, Pro-se, and request this Honorable Court enter an order granting Defendants Motion for different judge to consider Pursuant to Ill. Rev. Stat. 725 ILCS 5/122-8. In support of said motion Defendant state as follows:

1) On, or about, September 25, 1996, prior to Defendants bench trial, Trial Judge, Michael P. Toomin received a letter from one Kathy Morris. (See exhibit 1 attached and incorporated herein by and with this reference).

2) Kathy Morris by way of the letter is a friend of the victim in this case at bar.

3) Within said letter to Judge Toomin, Ms. Morris informed the Trial Court of Defendants past criminal history with the Chicago Police Department, Area Five Detectives for the offense of first degree murder, which Judge Tommin normally would not have knew about.

4) Judge Michael P. Tommin did not suggest recusal, in spite of his knowledge of Defendants past criminal history and sat Trial Judge in Defendants bench trial, where Judge Toomin found Defendant guilty of count 1 and merged count 2 into count 1. Thereafter, sentencing Defendant to a term of fifty (50) years imprisonment.

5) Trial Judge, Michael P. Tommin was in direct violation of Illinois Supreme Court Rules Article 1. General Rules Code Of Judicial Conduct, S.Ct. Rule 63 [a judge should perform the duties of judicial office impartially and diligently] Canon 3(1)(a) which states:

C. Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

Therefore Judge Toomin had a duty to disqualify himself from any further proceedings, especially Defendants bench trial.

6) "Knowingly," "Knowledge," "Known" or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from the circumstances.

7) Trial Counsel, Joseph Kennelly being fully apprised that Trial Judge, Michael P. Toomin was aware of Defendants past criminal history (Tr. september 27, 1996) failed to file a motion on behalf of Defendant for the recusal of Judge Toomin on the meritorious issue Judge Toomin knew Defendants past criminal history which Judge Toomin would not have known about unless Defendant took the stand at trial, which Defendant did not do.

8) Dispite Trial Counsel's knowledge that Judge Toomin knew Defendants past criminal history, Trial Counsel advised Defendant to waive his constitutional rights secured by both the Illinois and United States Constitutions to be guarenteed to a jury trial (Tr. I3-I4) and proceeded to a bench trial with a trial judge who was aware of Defendants past criminal history where the trial judge would soley rule on Defendants guilt or innocents and/or sentence.

9) Prior to Defendants bench trial, Judge Toomin determined Defendant to be guilty and sentence that he would impose.

10) In Jemison v. Foltz, 672 F.Supp. 1002(E.D. Mich.1987) at 1003&1004, the trial judge supervised Jemison's probation for prior convictions. Despite the trial judges knowledge, judge did not suggest recusal and sat trial judge in Jemison's bench trial where the Judge soley ruled upon Jemison's guilt and sentence.

11) It can be inferred that the trier of fact in Jemison's bench trial had prior knowledge of Jemison's past criminal history by way of supervising Jemison's prior convictions.

12) It also can be inferred that Judge Michael P. Toomin had knowledge of Defendant O'Farrell's past criminal history by receiving Ms. Morris's letter which contained Defendants prior arrest for first degree murder. (See exhibit 1) & Tr. I3-I4)

13) In Jemison v. Foltz, 672 F.Supp. 1002 at 1007, the court found defense counsel's handling of the Jemison case, shocking, and concluded Jemison was clearly deprived effective assistance of counsel. Defense counsel had a duty to consult with Jemison on important decisions, and to bring to bear on such skill and knowledge as to make the trial reliable adversary proceeding as to the failure to file a motion for recusal of trial judge who knew Jemison's past criminal history.

14) Judge Michael P. Toomin should have recused himself from any further proceedings and should be barred from hearing Defendants successive post-conviction petition.

15) It would be a direct violation of Defendants Constitutional rights secured by both the Illinois and United States Constitutions under the Due Process and Equal Protection Clauses and Supreme Court Rule 63, C(1)(a) to have this Honorable Court now deny said motion and allow Judge Michael P. Toomin to again make a ruling on Defendants successive post-conviction petition with the judges prior knowledge of Defendants past criminal history.

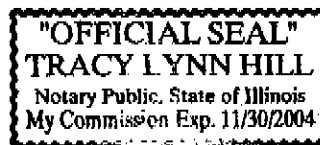
WHEREFORE, Defendant prays that this Honorable Court grant said motion and enter an order for a different judge to hear Defendants successive post-conviction petition.

Subscribed and Sworn to before me on  
this 1 day of May, 2003.

Tracy Lynn Hill  
Notary Public

Respectfully submitted,

Thomas O'Farrell  
Thomas O'Farrell,  
Defendant-Pro-se





1 STATE OF ILLINOIS )  
2 COUNTY OF C O O K )

3 IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
4 COUNTY DEPARTMENT - CRIMINAL DIVISION

5 THE PEOPLE OF THE )  
6 STATE OF ILLINOIS )

7 -VS- )

No. 95 CR 30463

8 THOMAS O' FARRELL )  
9 )

10 REPORT OF PROCEEDINGS had at the hearing  
11 of the above-entitled cause, before the Honorable  
12 MICHAEL TOOMIN, Judge of said Court, on the 9th day of  
13 July, A. D., 2003.

14 APPEARANCES:

15 HONORABLE RICHARD E. DEVINE,  
16 State's Attorney of Cook County, by:  
17 MR. XXXX XXXXXXXXXX,  
18 Assistant State's Attorney,  
19 appeared on behalf of the People;

20 MS. RITA FRY,  
21 Public Defender of Cook County, by:  
22 MR.  
23 Assistant Public Defender,  
24 appeared on behalf of the Defendant,  
\*\*\*\*\*

21 MS. BARBARA J. KIMBROUGH, CSR  
22 Official Court Reporter  
23 2650 South California  
24 Room 4 C 02  
Chicago, Illinois 60608

N-1

EXHIBIT W

35

1 THE COURT: 95 CR 30463-01, Thomas  
2 O'Farrell, O-f-a-r-r-e-l-l.

3 This case comes on my call from Judge  
4 Toomin's call. This Defendant filed a pro se Petition  
5 for Post-conviction relief in front of Judge Toomin,  
6 and also filed a Motion for a different judge to  
7 consider the Post-conviction. He is alleging that  
8 Judge Toomin should recuse himself because apparently  
9 in 1996 some friend of the victim sent Judge Toomin a  
10 letter. Thereafter, the Defendant was convicted in a  
11 bench trial by Judge Toomin.

12 In fact, this is his second  
13 Post-conviction Petition. In the first one he also  
14 filed a Motion for an SOJ, which I heard and denied.  
15 And the basis for the judge's purported bias or  
16 prejudice is because, according to Mr. O'Farrell,  
17 Judge Toomin had personal knowldge of facts from the  
18 letter.

19 Judges are deemed to be fair and  
20 impartial. The Defendant has failed to show that Judge  
21 Toomin is prejudiced against him; that he did not  
22 receive a fair ruling on his Post-conviction Petition.  
23 And in this case, case law is that the judge who heard  
24 the underlying trial should handle the

1 Post-conviction.

2 So, the Defendant's Pro Se Motion For  
3 SOJ is denied. The case is transferred instanter back  
4 to Judge Toomin.

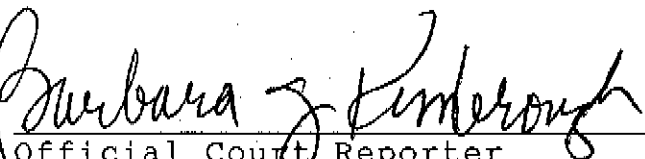
5 (WHICH WERE ALL THE PROCEEDINGS  
6 HAD IN THE ABOVE-ENTITLED CAUSE)

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1 STATE OF ILLINOIS)  
2 ) SS:  
3 COUNTY OF C O O K)  
4  
5  
6

7 I, BARBARA J. KIMBROUGH, CSR, Official Court  
8 Reporter of the Circuit Court of Cook County, County  
9 Department - Criminal Division, do hereby certify that  
10 I reported in shorthand the proceedings had at the  
11 hearing in the above-entitled cause; that I thereafter  
12 caused to be transcribed into typewriting the above  
13 Report of Proceedings, which I hereby certify is a  
14 true and correct transcript of the proceedings heard  
15 on said date, before the Honorable MICHAEL TOOMIN,  
16 Judge of said court.

17  
18   
19 Official Court Reporter  
20 Circuit Court of Cook County  
21 Criminal Division  
22  
23  
24



IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS,

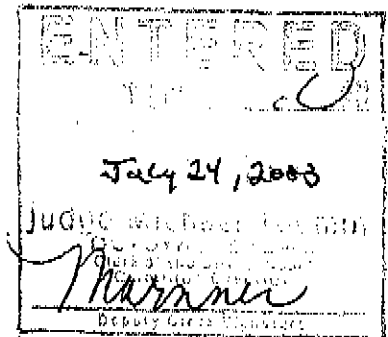
Plaintiff-Respondent,

-vs-

THOMAS O'FARRELL,

Defendant-Petitioner.

Post-Conviction  
95 CR 30463



ORDER

In this successive petition for post-conviction relief, Thomas O'Farrell again seeks relief from the judgment of conviction entered in the above-entitled cause on February 24, 1997. On that date, following a bench trial, this court sentenced O'Farrell to a term of 50 years imprisonment for the offense of first degree murder, in violation of Section 9-1-A of the Illinois Criminal Code, 720 ILCS 5/9-1A (West 1992). As grounds for relief, petitioner asserts that he was denied the effective assistance of counsel in his earlier post-conviction proceeding where appointed counsel, *inter alia*, failed to both include in her amended petition and argue meritorious claims of constitutional error which had been set forth in his original *pro se* petition.

### BACKGROUND AND PROCEDURAL HISTORY

The instant prosecution stemmed from the fatal shooting of petitioner's wife, Lesley O'Farrell, in the early morning hours of September 28, 1995. Mrs. O'Farrell was shot and killed by two gunshot wounds as she lay in her bed at the family residence located at 3435 West Ardmore Street in Chicago Illinois.

At trial, the evidence established that Chicago Police Officers responded to the scene pursuant to a radio transmission alerting them that a shooting or burglary was in progress. Upon arrival, the officers were met by petitioner who was bleeding from a gunshot wound to his shoulder. O'Farrell told the officers that he and his wife had been shot by an intruder who entered their second floor bedroom. He described the offender as "a six foot three inch, black man with short black hair, approximately 200 pounds." (R. Vol. IV at 26). O'Farrell related that he was awakened by a loud boom and then observed the intruder. He further claimed that as he tried to disarm the offender he was shot in the ensuing struggle. O'Farrell repeated this version of the events to the police officer who accompanied him to Illinois Masonic Hospital and also to Detective William Kernan who interviewed him there.

As the investigation continued, O'Farrell was confronted with certain discrepancies in his initial version. Sensing that O'Farrell had become a suspect, rather than simply a witness, Detective Richard Schak administered *Miranda* warnings to him. O'Farrell then changed his story, informing Schak that he had killed his wife pursuant to a mutually conceived plan. O'Farrell related that Lesley was a diabetic and was beginning to experience kidney failure. Also, she had been diagnosed with Bell's Palsy and voiced concerns over her disfigurement. He told Detective Schak that when he arrived home

from work that evening his wife produced the weapon, a Derringer, and asked him to shoot her when she fell asleep. Earlier, she had removed a glass pane from the downstairs bathroom window to make it appear that an intruder had entered. After deciding to implement the plan, O'Farrell fired a shot into his wife's head as she lay in her bed and directed another shot to her chest. He fired a third shot in the hallway, and, after shooting himself in his shoulder, he put the Derringer in a video cassette box and then called 911. In an interview with Assistant State's Attorney Tom Koungias, O'Farrell essentially repeated what he had told Detective Schak.

Dr. Nancy Jones, the medical examiner, removed two bullets from the victim's remains, opining that the cause of death was multiple gunshot wounds. Additionally, a gunshot residue test administered to O'Farrell revealed the presence of residue on his left hand, indicating that he had handled, fired or been in close proximity to a weapon when it was discharged. (R. Vol. IV at 140).

At the conclusion of the trial, O'Farrell was found guilty of two counts of first degree murder. In the capital sentencing proceeding that followed, petitioner again waived jury and the issue of eligibility was presented to this court. After the proofs had been concluded, the court determined that the State had failed to establish by its requisite burden that the murder had been committed in a cold, calculated and premeditated manner pursuant to a preconceived plan.

As the sentencing hearing continued the State presented Thomas Dye, a police informant, who testified regarding conversations he shared with petitioner while they were cellmates in the Cook County Jail. Dye related that O'Farrell told him that he had planned to kill his wife, that he did not like her, and that he had stayed with her to solidify

the insurance money that was coming from her grandparents. Although O'Farrell's son would inherit the money, petitioner related that he would be in a position to control the inheritance during his son's minority. O'Farrell further expressed his hope to be found guilty of second degree murder because his father was a police officer, his wife's illness would support the claim of a mercy killing and he had no criminal record.

In mitigation, the defense presented Dr. Larry Heinrich, a licensed clinical psychologist who evaluated O'Farrell for fitness and sanity during the course of the trial proceedings. Dr. Heinrich concluded that O'Farrell suffered from chronic depression related to family and personal issues. He also noted that the victim had manifested passive suicidal ideation and wishes during therapy sessions.

At the conclusion of the hearing, O'Farrell was sentenced to a term of fifty years imprisonment in the Illinois Department of Corrections. Thereafter, a direct appeal was taken to the Illinois Appellate Court, wherein O'Farrell claimed that:

- 1) He received an excessive sentence;
- 2) The mittimus should be amended to reflect that he was convicted and sentenced for only one count of first degree murder; and
- 3) He should not have been subject to the truth-in-sentencing law because it violated the single-subject rule of the Illinois Constitution.

In affirming petitioner's conviction, while rejecting claims one and two, the reviewing court, by its order of March 24, 1999, modified the mittimus in conformity with *People v. Reedy*, 295 Ill. App.3d 34, 44, 692 N.E.2d 376 (1998), to reflect petitioner's entitlement to receive one day of good conduct credit for each day of service in prison. *People v. Thomas O'Farrell*, No. 1-97-0911 (1999), (unpublished order under Supreme court Rule 23).

Although O'Farrell sought further review in the Illinois Supreme Court, his petition for leave to appeal was denied on February 2, 2000. See, *People v. O'Farrell*, 187 Ill.2d 585, 724 N.E.2d 1273 (2000). The record does not reflect whether O'Farrell proceeded further by way of *certiorari* in the United States Supreme Court.

However O'Farrell did seek collateral relief in a Motion for Writ of Habeas Corpus filed in this court on October 25, 1999. In that proceeding, O'Farrell claimed that because he had not been prosecuted by the State of Illinois, but rather by the Cook County Court, a home rule unit, his conviction and ensuing imprisonment constituted an unlawful and unconstitutional detention. Following due consideration of the merits of O'Farrell's motion, this court by order of November 2, 1999, denied habeas corpus relief. Although O'Farrell initially appealed this order, the appellate court subsequently allowed his motion to withdraw the appeal.

O'Farrell also sought collateral relief in a post-conviction proceeding commenced in this court on January 26, 2000. In his *pro se* petition O'Farrell asserted that he had been denied the effective assistance of counsel by trial counsel's:

- 1) Failure to adequately investigate and present meritorious evidence in support of his pretrial motions to suppress evidence and his motion to suppress statements.
- 2) Coercive tactics employed to obtain petitioner's jury waiver;
- 3) Failure to present meritorious evidence and argument supporting entry of judgment for the lesser grade offense of second degree murder.
- 4) Failure to present meritorious evidence establishing perjurious testimony of Chicago Police Officers Collins and Moran, as well as Tommy Dye;
- 5) Failure to adequately prove and present in a post-trial motion evidence of judicial misconduct; and

- 6) Failure to adequately investigate and present meritorious mitigation evidence at sentencing and in his motion to reconsider sentence.

Although O'Farrell also sought to disqualify this court upon allegations of bias, his motion for substitution of judges was heard and denied by Judge Colleen McSweeney Moore on February 15, 2000. When the matter was returned to this call, the court docketed O'Farrell's *pro-se* filing and appointed Attorney Deborah J. Gubin to represent him in his post-conviction proceeding.

On April 13, 2001, an amended post-conviction petition was filed with petitioner's concurrence asserting that counsel's representation was ineffective in that:

- 1) Trial Counsel's presentation and argument of the Motion to Quash Arrest and Suppress Evidence and Motion to Suppress Physical Evidence was inadequate;
- 2) Trial Counsel failed to present meritorious evidence to support entry of the lesser judgment of second degree murder;
- 3) Trial Counsel failed to adequately prepare for and represent petitioner at the sentencing hearing;
- 4) Appellate Counsel failed to raise the following issues on appeal
  - The denial of the Motion to Quash Arrest and Suppress Evidence,
  - The denial of the Motion to Suppress Physical Evidence;
  - Trial counsel's ineffective representation at trial and at the sentencing hearing;
  - The denial of the motion for additional discovery concerning Mr. Dye, and
  - Prosecutorial misconduct concerning the use of Mr. Dye at sentencing.
- 1) Additionally, the court's error in allowing Mr. Dye to testify without insuring that all *Brady* material had been tendered to the defense.

On May 7, 2001, counsel filed an amendment to the amended petition, adding the claim of excessive sentence.



Thereafter, respondent moved to dismiss the proceeding asserting that the amended petition failed to raise any constitutional questions within the purview of the Post-Conviction Hearing Act, that the claims presented were barred by the doctrines of *res judicata* and waiver, and that the petition failed to establish the requisite deficient performance and resulting prejudice to support a claim of ineffective assistance of counsel. On October 4, 2001, by its written order of 16 pages, this court granted the Motion to Dismiss. (See, Ruling on Respondent's Motion to Dismiss attached hereto and made a part hereof as Exhibit 1). An examination of this court's records as well as the appellate court reveals that no appeal was taken from the dismissal order.

#### ANALYSIS

With this procedural history in mind, the court will now address Mr. O'Farrell's most recent filing, a successive petition for post-conviction relief, filed in the Circuit Court of Cook County on May 27, 2003. Although O'Farrell again sought to disqualify this court upon allegations of bias, his Motion for Substitution of Judges was heard and denied by Judge Colleen McSweeney Moore on July 9, 2003. In his *pro se* petition O'Farrell asserts that his post-conviction counsel was deficient by reason of her failure to include in the amended petition the following issues, each of which he claims was raised in his original *pro se* petition:

- 1) That trial counsel failed to present additional evidence at the suppression hearing proving that petitioner's confession was illegally obtained;
- 2) That post-conviction counsel was grossly inadequate by her failure to honor petitioner's direction to raise and present his meritorious claim that the evidence supported a conviction for the lesser offense of second degree murder; and

- 3) That post-conviction counsel was grossly inadequate by her failure to perfect a timely notice of appeal following dismissal of petitioner's original post-conviction petition, after being instructed to do so by petitioner.

Initially, the court recognizes its duty to examine the petition and make a determination of its legal sufficiency pursuant to Section 122-2.1 of the Post-Conviction Hearing Act ("Act"). 725 ILCS 5/122-2.1 (West 2003); *People v. Holiday*, 313 Ill.App.3d 1046, 1048, 732 N.E.2d 1, 2 (4<sup>th</sup> Dist.2000). A post-conviction petition is a collateral attack on prior conviction and sentencing. *People v. Simms*, 192 Ill.2d 348, 359, 736 N.E.2d 1092, 1105 (2000). Under the act, a defendant may challenge his conviction or sentence for violations of federal or state constitutional rights. *People v. King*, 192 Ill.2d 189, 192, 735 N.E.2d 569, 572 (2000). However, the court is also empowered to summarily dismiss non-meritorious claims raised by the defendant. *People v. Richardson*, 189 Ill.2d 401, 407, 727 N.E.2d 362, 367 (2000).

First, it is apparent that O'Farrell's claim of ineffective assistance of counsel is barred by the doctrine of waiver. As noted, this is petitioner's second petition for post-conviction relief. The Post-Conviction Hearing Act generally limits a petitioner to the filing of only one post-conviction petition. *People v. Holman*, 191 Ill.2d 204, 209, 730 N.E.2d 39, 43 (2000). Indeed, "a ruling on an initial post-conviction petition has *res judicata* effect with respect to all claims that were raised or could have been raised in the initial petition." *People v. Jones*, 191 Ill.2d 354, 358, 732 N.E.2d 573, 575 (2000); see also 725 ILCS 5/122-3 (West 2001). Thus, as a threshold matter, this court must determine whether the waiver rule should be relaxed and petitioner's successive claims be considered.

A narrow exception to the waiver rule holds that a claim brought in a successive petition will be considered if the prior proceedings were deficient in some fundamental way. *People v. Britt-El*, No.89837, slip op. at \*13 (Ill. Sup. Ct., August 29, 2002). In *People v. Pitsonbarger*, No. 89368, slip op. (Ill. Sup. Ct., May 22, 2002), the Illinois Supreme Court announced a new method for analyzing claims raised in successive post-conviction petitions to determine if a fundamental deficiency existed in the prior proceedings. First, the court noted that Section 122-3 of the Act provides that any "claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." *Pitsonbarger*, No. 89368, slip op. at 10 (quoting *People v. Flores*, 153 Ill.2d 264, 274, 606 N.E.2d 1078, 1083 (1992)).

The Supreme Court further held that the "cause-and-prejudice test" is the analytical tool that courts should use to determine whether fundamental fairness requires that an exception to the waiver rule be made and successive claims be considered on their merits. *Pitsonbarger*, No. 89368, slip op. at 10. For purposes of the "cause-and-prejudice test," "cause" is defined as "some objective factor external to the defense [that] impeded counsel's efforts to raise the claim in an earlier proceeding." *Pitsonbarger*, No. 89368, slip op. at 11 (quoting *Flores*, 153 Ill.2d at 279, 606 N.E.2d at 1085). "Prejudice" will be found where "the petitioner [was] denied consideration of an error that so infected the entire trial that the resulting conviction or sentence violates due process." *Pitsonbarger*, No. 89368, slip op. at 15 (quoting *Flores*, at *id.*).

This new mechanism for evaluating successive claims shifts the focus from the sufficiency of the original post-conviction proceeding to whether the petitioner had the ability to raise the successive claim in that initial proceeding. Thus, the court held that,

rather than focusing on whether a successive petition will be allowed, trial judges should apply the cause-and-prejudice test to individual claims. *Pitsonbarger*, No. 89368, slip op. at 13. In other words, "the petitioner 'must show how the deficiency in the first proceeding affected his ability to raise each specific claim.'" *People v. Thompson*, 331 Ill.App.3d 948, 954, 773 N.E.2d 15, 20 (1<sup>st</sup> Dist. 2002) (*Quoting Pitsonbarger*, No. 89368, slip op. at 13).

In the present case, O'Farrell fails to demonstrate that fundamental fairness requires relaxation of the waiver rule and consideration of his claim of ineffective assistance of trial counsel. O'Farrell articulates no reason why he could not have raised this issue in his amended petition for post-conviction relief. Although the factual assertions relied upon by O'Farrell in support of the claim were available to him at the time he filed his amended post-conviction petition, he has failed to identify any external factor which impeded his effort to raise the claim in that proceeding. O'Farrell does not allege that the facts that provide the basis for his claim were withheld from him or that the claim is based on newly discovered evidence. Rather, the claim was not included in the amended petition because post-conviction counsel believed it lacked merit, a decision concurred in by petitioner (*See*, Exhibit "E" attached to petitioner's successive petition). Nor has O'Farrell demonstrated that, had this claim been presented, there is a reasonable probability that he would have prevailed. Clearly, O'Farrell has failed to demonstrate that he was precluded from raising this claim in the initial post-conviction proceeding or that prejudice resulted from counsel's decision to forego inclusion of that issue in the amended petition. Thus, O'Farrell has failed to demonstrate that the prior proceeding was deficient in any fundamental way.

O'Farrell next claims that post-conviction counsel was grossly inadequate when she failed to include in the amended petition that petitioner met his burden of proving sudden and intense passion, thereby entitling him to a judgment on the lesser offense of second degree murder. However, the issue of post-conviction counsel's effectiveness is not properly before this court through a successive petition, but rather, should have been raised in appeal of this court's order granting Respondent's Motion to Dismiss. *People v. Flores*, 153 Ill.2d 264, 277, 606 N.E.2d 1078, 1084 (1992) (holding that claims of ineffective assistance of counsel in prior petitions is beyond the scope of the Act). Moreover, petitioner is in error in his assertion that Attorney Gubin failed to include this issue in her amended petition. (See, amended post-conviction petition, page 3):

"2. Mr. Kennelly failed to call any witnesses which could have introduced evidence of the emotional state of defendant and deceased at the time of the incident which would have reduced the matter to second degree. Included in this is the emotional and physical condition of the deceased; his statements to defendant's family members.

- A. Thomas C. O'Farrell was ready willing and able to testify as to the relationship between O'Farrell and Lesley; his observations of her mental state. (Affidavit of Thomas C. O'Farrell).
- B. Mrs. O'Farrell was ready, willing and able to testify as to the deceased's state of mind and her observations of the relationship between O'Farrell and his wife. (Affidavit of Mary A. O'Farrell).
- C. Failed to call his medical expert on the effect Lesley's medical condition could have on her mental state in conjunction with her documented "Chronic Depression".

It is further apparent that this court gave full consideration to this issue and concluded that there was no merit to the claim that the evidence supported a second degree finding. (See, Ruling on Respondent's Motion to Dismiss, at 10-11). Accordingly, further consideration of this claim is foreclosed by the doctrine of *res judicata*.

O'Farrell's successive petition further claims that counsel was grossly inadequate by failing to perfect a timely notice of appeal following dismissal of petitioner's original post-conviction petition after being instructed to do so by petitioner. Petitioner cites Exhibit F, attached to the successive petition in support of this claim. In reality, that exhibit is a letter from Attorney Gubin informing O'Farrell of this court's denial of his petition and enclosing the written findings entered by the court. Counsel also informed O'Farrell of his appeal rights specifically noting:

"If you wish I will file a notice of appeal, order the transcript on argument and today's ruling and request counsel be appointed. Please inform me of your decision."

Clearly, this exhibit lends no credence to O'Farrell's present claim that he requested counsel to perfect his appeal. Nor has he provided any other documentation or communication in support of that assertion. What the record establishes is that although post-conviction counsel stood ready to protect petitioner's appeal rights, O'Farrell took no steps to make his desires known to counsel.

Interestingly, what the common law records does reflect is that O'Farrell on his own elected to insure that his appellate rights were secured. In a *pro se* filing of November 1, 2001, O'Farrell forwarded to the Clerk of the Circuit Court his "Affidavit of Intent to File Appeal," together with his "Motion for Appointment of Counsel" and "Motion for Leave to Proceed in Forma Pauperis". However because O'Farrell failed to file the requisite Notice of Appeal, the Clerk did not docket the papers and transmit them to the appellate court. Consequently it is manifestly disingenuous for O'Farrell to now seek to hold appointed counsel responsible for the loss of his appellate rights when he, by his own hand, was clearly the responsible party. Furthermore, it would have been unnecessary for

petitioner to have docketed his *pro se* filings if he indeed had instructed counsel to perfect his appeal.

O'Farrell also faults Attorney Gubin for failing to include in her amended post-conviction the issues raised in his original *pro se* petition. O'Farrell asserts that he instructed Ms. Gubin not to delete any of these issues but that she nonetheless failed to abide by his direction. Support for petitioner's claim is said to be found in Exhibit "E" attached to the successive petition. Yet, a clear reading of that correspondence clearly belies his assertion. In the letter, O'Farrell memorializes his understanding that Ms. Gubin include two issues – illegal arrest and second degree murder – within the amended petition, a direction which she most assuredly followed. The letter makes no mention of the issues raised in the original petition, nor did O'Farrell at any time, up to now, inform this court of his dissatisfaction with the amended petition. The doctrine of waiver should serve to preclude O'Farrell from raising this issue now.

Moreover, O'Farrell chooses to overlook the fact that, in amending the original petition, Ms. Gubin was fulfilling her responsibilities as appointed counsel in accordance with well-established rules. As our supreme court recognized many years ago in *People v. Slaughter*, 39 Ill.2d 278, 284-85, 235 N.E.2d 566, 569 (1968):

"The Post-Conviction Hearing Act provides that counsel shall be appointed to represent indigent prisoners who request counsel and it also provides that a petition may be amended or withdrawn. (Ill. Rev. Stat. 1967, chap. 38, pars. 122-4, 122-5.) These provisions were included because it was anticipated that most of the petitions under the Act would be filed *pro se* by prisoners who had not had the aid of counsel in their preparation. To the end that the complaints of a prisoner with respect to the validity of his conviction might be adequately presented, the statute contemplated that the attorney appointed to represent an indigent petitioner would consult with him either by mail or in person, ascertain his alleged grievances, examine the record of the proceedings at the trial and then amend the petition that had been filed *pro se*, so that it would adequately present the prisoner's constitutional contentions..."

O'Farrell recognizes that he has no constitutional right to the assistance of counsel at a post-conviction proceeding. The law requires only a "reasonable level of assistance" by appointed counsel at such proceedings. *People v. Moore*, 189 Ill.2d 521, 541, 727 N.E.2d 348, 358-59 (2000). In the instant case, Ms. Gubin's representation was in conformance with that standard. O'Farrell's filings reflect that she consulted with him both by mail and in person, that she ascertained his grievances, examined the record of the trial proceedings and then amended the *pro se* petition to the end that it adequately presented petitioner's constitutional contentions. Her amended petition, which was complete in itself, caused the original petition in effect to be abandoned and withdrawn. *Larkin v. Sanelli*, 213 Ill.3d 597, 602, 572 N.E.2d 1145, 1149 (1<sup>st</sup> Dist, 1991); *Field Surgical Associates, LTD. v. Shadob*, 59 Ill.App.3d 991, 994, 376 N.E.2d 660, 663 (Dist.1978); *Yarc v. American Hospital Supply Corp.*, 17 Ill.App.3d 667, 670, 307 N.E.2d 749, 752 (Dist.1974).



CONCLUSION

Based upon the foregoing discussion, the court finds that the issues raised and presented by Mr. O'Farrell are frivolous and patently without merit. Accordingly, the successive petition for post-conviction relief shall be and is hereby dismissed. Likewise, O'Farrell's motions for appointment of counsel and for leave to proceed in *forma pauperis* is also denied.

ENTERED: 

Michael P. Toomin  
Supervising Judge  
Circuit Court of Cook County  
Criminal Division

DATED: July 24, 2003



3RD POST-CONVICTION

STATE OF ILLINOIS)  
   ) ss  
 COUNTY OF COOK        )

IN THE CIRCUIT COURT OF COOK COUNTY  
 COUNTY DEPARTMENT - CRIMINAL DIVISION

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PEOPLE OF THE STATE OF ILLINOIS,)	
Plaintiff-Respondent,)	
)	CASE NO. 95 CR 3046301
)	
)	JUDGE _____
)	
THOMAS O'FARRELL,	
Defendant-Petitioner,)	

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PETITION FOR POST-CONVICTION RELIEF

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NOW COMES, Petitioner, Thomas O'Farrell, Pro-Se, pursuant to Chapter 725 ILCS 5/122-1 et.seq. of the Illinois Compiled Statutes, hereby respectfully requesting that this Honorable Court to grant him post-conviction relief. In support of said petition, Petitioner states the following:

1) On September 28, 1995, Petitioner was charged with two counts of first degree murder -- by superseding indictment -- in the shooting death of his wife, Lesley Chapman-O'Farrell.

2) On January 21, 1997, following a bench trial, Petitioner was convicted of both counts of first degree murder.

3) On February 28, 1997, Petitioner was sentenced to a term of fifty (50) years imprisonment within the Illinois Department of Corrections.

4) On March 24, 1999, the Illinois Appellate Court, First Judicial District, affirmed Petitioner's conviction and modified the sentence.

5) Petitioner was subsequently denied leave to appeal to the Illinois Supreme Court.

6) On January 25, 2000, Petitioner filed his original petition for post-conviction relief in the Court. (see exhibit A Petitioner's second petition for post-conviction relief).

7) Petitioner's original petition survived the 90-day dismissal period in its entirety, and counsel was then appointed.

8) On April 13, 2001, post-conviction counsel filed her amended post-conviction petition, and removed Petitioner's original petition, forclsing review of several substantial claims raised within the original petition. (see exhibit B & C Petitioner's second petition for post-conviction relief).

9) On October 4, 2001, this Honorable Court granted the State's motion to dismiss the amended petition.

10) On May 21, 2003, Petitioner filed a successive post-conviction petition.

11) On July 24, 2003, this Honorable Court dismissed Petitioner's successive petition.

12) To survive stage one, the petition must only provide a gist of a Constitutional claim. People v. Scullark, 795 N.E.2d 565 at 570-571.

13) A post-conviction petition suffices if it sets forth the gist of a meritorious Constitutional claim -- means that the pro-se petitioner need not consrtuct legal arguments in their petition nor even understand what legal arguments the fact they present therein might support. People v. Lemons, 613 N.E.2d 1234 at 1238.

14) Therefore, we cunclude that in order to withstand

dismissal at the first stage of post-conviction proceedings. a petition for post-conviction relief need only contain a simple statement which presents the gist of a claim of relief which is meritorious when considered in view of the record of trial court proceedings. Requiring pro-se petitioner to state their claims in great detail than this would have the practical effect of depriving many such persons of their right of meaningful access to the court's. Lemons, 613 N.E.2d 1234 at 1240.

#### CAUSE AND PREJUDICE

15) As stated above, Petitioner has previously filed two petitions for post-conviction relief.

16) Petitioner contends that he meets the criteria for filing another successive post-conviction petition announced by the Illinois Supreme Court in People v. Pitsonbarger, \_\_\_ Ill.2d \_\_\_, (2002), 2002 WL 1038729 (Ill. 2002)

17) In Pitsonbarger, the Court held that in order for a defendant to file a successive petition under the Illinois Post-Conviction Hearing Act, he must demonstrate "Cause" for his failure to raise the claim in his original post-conviction petition.

18) Thus when "Cause" is based on a fundamental deficiency in the first post-conviction proceedings, the petitioner must show that the deficiency directly affected his ability to raise the specific claim now asserted. Pitsonbarger, note #18.

19) Once a defendant has demonstrated "Cause", he then must demonstrate "Prejudice".

20) "Prejudice", in the context, would occur if the petitioner were denied consideration of an error that so infected the entire trial that the resulting conviction or sentence violates due process. Pitsonbarger, note #25.

21) Petitioner had the Constitutional Right under Due Process to effective assistance of counsel during the trial and direct appeal proceedings under the Sixth Amendment of the United States Constitution and Article 1 Section 2 of the Illinois Constitution which were grossly violated.

22) Petitioner had the right to a reasonable level of assistance of counsel during the post-conviction proceedings under the Post-Conviction Hearing Act 725 ILCS 5/122-1.

23) Trial counsel, Joseph Kennelly failed to prusue the meritorious claim within Claim One herein during the pre-trial motions and/or trial proceedings constituting ineffective assistance of counsel which infected the entire trial and sentence resulting in the violation of Petitioner's due proccess rights.

24) Direct appeal counsel, James Chadd failed to pursue the meritorious claim within Claims One and Two herein during the direct appeal proceedings constituting ineffective assistance of counsel which resulted in the violation of Petitioner's due process rights.

25) Post-conviction counsel, Deborah J. Gubin failed to pursue the meritorious claim within Claims One, Two and Three herein within her amended and amendment to the amended post-conviction petition constituting ineffective assistance of counsel ans a level of assistance well below the reasonable assistance required

by the Post-Conviction Hearing Act.

26) "[C]onstitutionally ineffective assistance of counsel... is Cause.'" People v. Flores, 606 N.E.2d 1078 at 1085.

27) Petitioner is a severe dyslexic and has an extremely hard time reading and writing. (see exhibit 1 & 2 attached and incorporated herein by and with this reference). Clearly, Petitioner is a layman to the law and is without the knowledge and understanding of the Illinois Compiled Statutes, namely the Statute regarding the offense of Inducement to Commit Suicide. If not for a careful reading of Illinois Compiled Statutes one may never be apprised of the Inducement to Commit Suicide Statute at all. Petitioner certainly is unable to know as to how his circumstances, evidence, affidavits and the record can be utilized to show how Petitioner has met the requirements of the Inducement to Commit Suicide Statute and the Constitutional Provisions of Due Process and Equal Protection Clauses of both the Illinois and United States Constitutions and the Limitation of Penalties After Conviction Clause of the Illinois Constitution. It is obvious that Petitioner's disabilities affected his ability to raise this meritorious claim in prior proceedings.

28) The ineffective assistance of counsel at trial, direct appeal and post-conviction proceedings along with Petitioner's disabilities demonstrates "Cause" within the meaning of the holding in Pitsonbarger.

29) "Prejudice", within the meaning of the Pitsonbarger decision, is demonstrated by the fact the trial, direct appeal and post-conviction counsel's failure to address the meritorious

claims within Claims One through Four herein resulted in the claims being procedurally defaulted and waived for review for purpose of appeal and habeas corpus. This will preclude Petitioner from seeking State and Federal review on the meritorious claims herein violating Petitioners Constitutional Rights to appeal.

30) The Right to appeal is secured under Article 6 Section 6 of the Illinois Constitution. To be denied the Right to appeal is a clear misjustice of the law and is a violation of the Illinois Consttution and is "Prejudicial" in itself.

31) Because a proceeding brought under the Act is a collateral attack on a judgement of conviction, all issues which could have been raised in the original proceedings, but were not, are waived. The doctrine of res judicata and waiver, however, will be relaxed in three situations: where fundamental fairness so requires; where the alleged waiver stems from the incompetence of appellate counsel; or where the facts relating to the claim do not appear on the face of the original appellate record. People v. Mahaffey, 742 N.E.2d 251 at 261.

32) Petitioner has met the "Cause" and "Prejudice" test to relax the waiver doctrine. Petitioner has also demonstrated that he has met the requirements within Mahaffey. Not one and all three requirements to relax the waiver doctrine.

33) Therefore, Fundamental fairness requires relaxation of the waiver doctrine under the meaning of the Pitsonbarger decision.



CLAIM ONE

DEFENDANT'S FIRST DEGREE MURDER CONVICTION MUST BE REVERSED WHERE DEFENDANT HAS MET THE STATUTORY REQUIREMENTS OF THE OFFENSE OF INDUCEMENT TO COMMIT SUICIDE PURSUANT TO 720 ILCS 5/12-31(a)(2)(ii) AND THE CONSTITUTIONAL PROVISIONS OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSE OF BOTH THE ILLINOIS AND UNITED STATES CONSTITUTIONS AND THE LIMITATION OF PENALTIES AFTER CONVICTION CLAUSE OF THE ILLINOIS CONSTITUTION..

34) It is clear that the members of Congress gave careful attention in determining the wording and their INTENT in the drafting and adopting our Illinois Constitution. In doing so, Congress solely relays on the judgement of the Governor and General Assembly of Illinois to create the laws and the proper statutory sentence for specific offenses.

35) Under Due process and Equal Protection clauses of both the Illinois and United States Constitutions, similar situated persons have a right to be treated in a similar manner. (Il.Const. Art.1 Sec.2 and 14th Amend. Sec 1 U.S.Const.)

36) The United States Supreme Court ruled that Equal Protection Clause directs that "All persons similarly circumstanced SHALL be treated alike." Plyler v. Doe, 102 S.Ct. 2382 at 2394.

37) Under the Limitation of Penalties After Conviction Clause of the Illinois Constitution, all penalties SHALL be according to the seriousness of the OFFENSE. (Il.Const. Art.1 Sec.11).

38) The Illinois Supreme Court stated that "Article 1, Section 11, of the Constitution is applicable to the Legislature as well as to courts. Section 11 is DIRECTED to the Legislature in its function of declaring what CONDUCT is CRIMINAL and the PENALTIES for the CONDUCT and that it is within the Legislative province to DEFINE OFFENSES and determine the PENALTIES REQUIRED to protect the intrests of our society. People v. Taylor, 102 Ill.2d 201 at

205-206.

39) Thirty-six states and territories currently have statutes imposing criminal sanctions for aiding, assisting, causing, or promoting suicide. (FN10). Compassion in Dying v. State of Washington, 79 F.3d 720 at 847. (FN10) Ill.Rev.Stat. Ch. 720 ¶ 5/12-31 (westlaw 1996), State of Washington, 79 F.3d 720 at 858.

40) Most states have consistently punished the act of assisting a suicide as either a common-law or statutory crime and some continue to view suicide as an unpunishable crime. (FN14). Washington v. Glucksberg, 117 S.Ct 2258 at 2286. (U.S.Wash.1997) (FN14) Ill.Comp.Stat., Ch.720 § 5/12-31(1993) Glucksberg, 117 S.Ct. 2258 at 2293. (see exhibit 3 attached and incorporated herein).

41) It is clear that the Governor and General Assembly of Illinois gave careful consideration in determining the statutory requirements and their INTENT in drafting and enacting the laws and proper statutory sentence for the offense of Inducement to Commit Suicide. (Public Acts 86-980, 87-1167, 88-392, Ch. 38 par. 12-31 and 720 ILCS 5/12-31 (1990-1993)).

42) From its birth in July 1990, the offense of Inducement to Commit Suicide went through several amendments, where the Governor and General Assembly changed the statutory requirements to be met by a defendant.

43) Throughout the life of the offense of Inducement to Commit Suicide the statutory sentence went from a Class 2 felony, to a Class 3 felony to the present Class 4 felony.

44) The present Statute reads as follows:

5/12-31. Inducement to Commit Suicide.

§12-31. Inducement to Commit Suicide.

- (a) A person commits the offense of inducement to commit suicide when he or she does either of the following:
  - (1) Coerces another to commit suicide and the other person commits or attempts to commit suicide as a direct result of the coercion, and he or she exercises substantial control over the other person through (i) control of the other person's physical location or circumstances; (ii) use of psychological pressure; or (iii) use of actual or ostensible religious, political, social, philosophical or other principles.
  - (2) With knowledge that another person intends to commit or attempts to commit suicide, intentionally (i) offers and provides the physical means by which another person commits or attempts to commit suicide, or (ii) participates in the physical act by which another person commits or attempts suicide.

For the purpose of this Section, "attempts to commit suicide" means any act done with the intent to commit suicide and which substantial steps toward commission of suicide.

- (b) Sentence.
  - Inducement to commit suicide under paragraph (a)(1) when the other person commits suicide as a direct result of the coercion is a Class 2 felony.
  - Inducement to commit suicide under paragraph (a)(2) when the other person commits suicide as a direct of the assistance provided is a Class 4 felony.

45) In accordance with the Statutory Sentencing Guidelines the appropriate sentence for the offense of Inducement to Commit Suicide is a Class 4 felony.

46) The statute on sentencing which was in effect when Petitioner committed his offense reads as follows:

§ 5/5-8-1 Sentencing of imprisonment for felony.

- (a) Except as otherwise provided in the statute defining the offense, a sentence of imprisonment for a felony SHALL be a determinate sentence set by the court under this Section, according to the following limitations;
  - (7) for a Class 4 felony, the sentence SHALL be not less than 1 year and not more than 3 years.

47) Petitioner will now demonstrate via the Inducement to

Commit Suicide Statute 720 ILCS 5/12-31(a)(2)(ii) and the record that: 1) the evidence within the record will reflect that the victim, Lesley Chapman-O'Farrell did in fact commit suicide; 2) Petitioner was in fact a participant in the physical act by which the victim, Lesley committed suicide; and 3) Petitioner has met the Statutory Requirements set forth within the statute for Inducement to Commit Suicide 720 ILCS 5/12-31(a)(2)(ii).

48) The record will reflect the following:

a) That the victim, Lesley Chapman-O'Farrell had passive suicidal ideation prior to her death. (Tr. K-39-40, K-55 and K-60);

b) That the victim, Lesley attempted suicide several time prior to her death. (Tr. I-149, I-154, I-192 and exhibit A's exhibits 2, 3, 4 and 9 of Petitioner's second post-conviction petition);

c) That the victim, Lesley continuously plead with Petitioner her husband for approximately 18 months prior to her death to help end her life because she no longer wanted to live with the pain and suffering that she was going through because of her medical conditions. (Tr. I-152, I-182 and exhibit A's exhibit 9 of Petitioner's second P.C.);

d) That the victim, Lesley told her family members that "I would rather die than to go through the rest of my life looking and feeling the way I do (regarding the paralysis to the side of her mouth and face and the pain in her head.)" (exhibit A's exhibits 2, 3 and 4 of Petitioner's second P.C.);

e) That the victim, Lesley had several severe medical conditions. (Tr. I-149, I-158, I-182, K-37-38, K-61 and exhibit A's

exhibits 9 and 16 of Petitioner's second P.C.);

f) That individuals with the medical conditions that the victim, Lesley had sometimes over-emphasize their illness. (Tr.K-61);

g) That Petitioner believed that his wife and victim, Lesley was terminall ill. (Tr.I-182,I-192 and K-50);

h) That Petitioner often missed and/or left work early because his wife and victim, Lesley was seriously ill and needed Petitioner to take care of her because she was unable to take care of herself. (exhibit A's exhibits 9 and 16 of Petitioner's second P.C.);

i) That the victim, Lesley wrote in her diary and mentioned to her doctor that she felt that Petitioner, her husband did help her when she was very ill and that she said that she knew that Petitioner did not want to lose her. (Tr.K-38);

j) That Petitioner loved his wife and victim, Lesley and would do anything possible to keep their marriage intact. (Tr.K-36-37);

k) That Petitioner's employer could not cover Petitioner's wife and victim, Lesley on the companies insurance policy due to her several severe medical problems. (exhibit A's exhibits 9 and 16 of Petitioner's second P.C.)

l) That Petitioner sufferd from chronic depression, severe emotional and mental disturbance at the time of the offense. (Tr.K-35 and K-39-40);

m) That the victim, Lesley enlisted Petitioner her husband

to assist in her suicide. (Tr.I-148-149,I-182 and exhibit A's exhibit 9 of Petitioner second P.C.);

n) That Petitioner's actions resulted from the pressure from his wife and victim, Lesley. (Tr.I-150-151);

o) That Petitioner confessed to assisting his wife, and victim, Lesley's suicide. (Tr. I-148-149 and I-182-183);

p) That Petitioner was truly remorseful for his actions. (Tr.K-58 and K-86);

q) That Petitioner told the police two versions of what happend on the morning the victim, lesley died. (Tr.I-206-208 and J-41);

r) That Petitioner first told the police that a unknown intruder, whom he described as a male black, about 200 pounds and six foot tall shot his wife and victim, Lesley and Petitioner. (Tr.I-206 and J-41);

s) That the second version Petitioner told the police and assistant state's attorney that of a mercy killing at the behest of his wife and victim, Lesley who engaged in the planning, who did certain of the preliminary work, discussed this in full with Petitioner her husband and provided the cover-up story to be told to the police. (Tr.I-208-209 and J-41-42); and

t) That there was physical evidence that corroborated the second version given by Petitioner. (Tr.I-208)

49) There is addition burden on loved ones and family members that is often overlooked. Some terminall ill persons enlist their children, parents, or others who care for them deeply, in an agonizing, brutal and damaging endeavor,

criminalized by the state, to end their pain and suffering. The loving and dedicated persons who agree to help--even if they are fortunate enough to avoid prosecution, and almost all are--will likely suffer pain and guilt for the rest of their lives.

Compassion in Dying v. State of Washington, 79 F.3d 720 at 836.

50) Some terminally ill patients stockpile prescription medication, which they can use to end their lives when they decide the time is right. Even if the terminally ill patient are able to accumulate sufficient drugs, given the pain killers and other medication they are taking, most of them would lack the knowledge to determine what dose of any drug or drugs they must take, or in what combination. Miscalculation can be tragic. It can lead to an even more painful and lingering death. Alternatively, if the medication reduces respiration enough to restrict the flow of oxygen to the brain but not enough to cause death, it can result in the patient's falling into a comatose or vegetative state. State of Washington, 79 F.3d 720 at 832.

51) Blacks law defines mercy killing as: Euthanasia. The affirmative act of bringing about immediate death allegedly in a painless way and generally administered by one who thinks the dying person wishes to die because of a terminal or hopeless disease or condition.

52) Euthanasia is defined by Blacks law as: The act or practice of killing or bringing about death of a person who suffers from an incurable disease or condition, especially a painful one, for reasons of mercy. - Also termed as mercy killing.

53) In prosecutions for homicide where suicide of deceased

is relied as a defense the deceased's conduct, declarations, and threats indicating a suicidal disposition are generally admitted into evidence for the purpose of showing the deceased's state of mind or intention. 40A Am Jur2d Homicide § 287 (Suicide)

54) The record clearly demonstrates that the victim, Lesley had suicidal ideation and had attempted suicide several times prior to her death. The record also reflects that the victim, Lesley enlisted Petitioner her husband to assist in her suicide. And Petitioner did in fact confess to assisting his wife and victim, Lesley's suicide.

55) It would be inconceivable to believe that watching his wife and victim, Lesley live in pain while slowly succumbing to her illness could not, or did not, served as a catalyst for Petitioner to want to end her pain and suffering.

56) Petitioner herein has enlightened the Court as to how the emotional state of either the victim, Lesley and Petitioner could have conceivably have warranted the offense of Inducement to Commit Suicide. Under the circumstances and evidence presented herein, competent counsel would have reasonably perceived that the emotional state of the victim, Lesley and Petitioner would suffice to establish the Statutory Requirements to support the offense of Inducement to Commit Suicide.

57) The evidence within the record and within this argument clearly demonstrates that Petitioner has met the Statutory Requirements of the offense of Inducement to Commit Suicide.

58) The State will most certainly contend that Petitioner committed the murder with premeditation. (Tr.J-4 and J-22)



In doing so the State must rely on the testimony of the State's witness, Thomas Dye. (Tr.K-8-K-29). However, the State's argument is misplaced and nonexistent for the following reasons:

a) At the end of the capital sentencing hearing the trial court found that the State failed to establish by its requisite burden that the murder had been committed in a cold, calculated and premeditated manner pursuant to a preconceived plan. (Tr. J-44);

b) The trial court was in the best position to assess Dye's credibility based on his testimony and in reviewing him. (Opinion of direct appeal dated March 24, 1999 pg. 16); and

c) The trial court clearly stated within its ruling on respondent's motion to dismiss dated October 4, 2001 "Moreover, it is apparent from the record that Dye's testimony had no effect upon the sentence imposed by this court." (Ruling pg.12) and "This is likewise true with respect to the issues surrounding Thomas Dye, for a careful reading of the record would have alerted appellate counsel to the fact that the court placed utterly no reliance upon Dye's proffers at sentencing." (Ruling pg. 14)

59) Therefore, the State should be barred from the usage of these unfounded theory's within these post-conviction proceedings to prevent Petitioner from receiving relief. Without the testimony of State's witness, Thomas Dye, the State did not present any evidence at trial or capital sentencing hearing to support the claim that Petitioner actions were premeditated in any manner.

60) Now without the theory that the murder was committed in

a premeditated manner, the State must then rely on the intent theory and that the murder was committed with malicious intent to prevent Petitioner from being granted relief on the meritorious claim. However, Petitioner agrees with the State to a degree. Petitioner argues that "yes" there is a certain degree of intent involved in the offense of Inducement to Commit Suicide although the intent is of love, compassion and of mercy.

61) The Inducement to Commit Suicide Statute 720 ILCS 5/12-31 (a)(2)(ii) more clearly defines Petitioner's actions and/or offense and also demonstrates that there is a degree of intent within said statute. (§ (a)(2). (INTENTIONALLY)

62) It is so very clear that the Governor and General Assembly of Illinois INTENDED that thoses who commit the offense as Petitioner did, that they be charged and sentenced to the offense of Inducement to Commit Suicide 720 ILCS 5/12-31 and not first degree murder.

63) Congress clearly made their INTENT known when they drafted and adopted our Constitution that thoses persons similarly situated SHALL be treated the same and therefore Petitioner had the right to be treated as those who commit the offense of Inducement to Commit Suicide under the Equal Protection Clauses.

64) Congress was also very clear that Petitioner has a right to be afforded the opportunity of a defense and/or lesser included offense of Inducement to Commit Suicide be brought before a fair and impartial jury under the Right to a Jury and Due Process Clauses of both the Illinois and United States Constitutions.

65) Petitioner has clearly demonstrated that he has met the Constitutional Requirements under the Due Process and Equal Protection Clauses of both the Illinois and United States Constitutions and has showed this Honorable Court that Petitioners Constitutional Rights were substantially violated under the same Constitutional Provisions.

66) Now Petitioner will demonstrate to this Honorable Court as to how his Constitutional Rights under the Limitation of Penalties After Conviction Clause of the Illinois Constitution was violated.

67) Petitioner was tried and convicted for two counts of first degree murder (Order dated July 24, 2003 pg.3) and was sentenced to a term of fifty years imprisonment within the Illinois Department of Corrections. (Order dated July 24, 2003 pg.4). The sentence of fifty years is well within the Statutory Guidelines of 730 ILCS 5/5-8-1 (first degree murder). However, the actual offense committed by Petitioner was not a first degree murder, but in fact was the offense of Inducement to Commit Suicide 720 ILCS 5/12-31(a)(2)(ii) and the appropriate sentence per the Statutory Guidelines 730 ILCS 5/5-8-1(a)(7) is a term not less than 1 year and not more than 3 years not the fifty years sentence imposed by the trial court.

68) The Governor and General Assembly of Illinois made it extremely clear that their INTENTIONS were that thoses who commit the offense of Inducement to Commit Suicide SHALL be sentenced to no more than three years imprisonment under the Statutory Guidelines 730 ILCS 5/5-8-1(a)(7). Therefore, the sentence of fifty years imposed on Petitioner was grossly excessive.

69) It is also very clear that Congree **INTENDED** that all penalties SHALL be according to the seriousness of the OFFENSE under the Limitation of Penalties After Conviction Clause of the Illinois Constitution.

70) Petitioner most certainly does not dispute that his actions were not of a serious nature, however Petitioner's actions were not of a first degree murder, clearly the most serious of the offenses within the Illinois Compiled Statutes. Petitioner's actions, however serious does not warrant the sentence of fifty years imprisonment, it does however warrant the maximum sentence aloud by the Statutory Guidelines which is three years for the actual offense of Inducement to Commit Suicide.

71) Moreover, a sentence which is within the statutory guidelines will not be disturbed upon review unless it is grossly disproportionate to the nature of the offense. People v. Phillips, 637 N.E.2d 715 at 722.

72) Any question of **INTENT** by Congress, the Governor and General Assembly of Illinois and the United States have been addressed and answered herein. The **INTENT** was made extremely clear by the careful selection of the words and adopting and/or enacting the Constitutional Provisions and Laws (statutes for seperate offenses and the sentences that **MUST** be imposed by the courts.

73) Petitioner has clearly demonstrated that he has met the Constitutional and Statutory Requirements of the Limitation of Penalties After Conviction Clause of the Illinois Constitution and 730 ILCS 5/58-1(a)(7) of the Statutory Guidelines of the

Illinois Compiled Statutes. Petitioner has also demonstrated that his Constitutional Rights under the same Constitutional Provisions were substantially violated.

74) Petitioner has clearly demonstrated that the fifty years imposed on Petitioner was grossly disproportionate to the nature of the offense, the offense being Inducement to Commit Suicide.

#### CLAIM TWO

PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE 1 SECTION 2 OF THE ILLINOIS CONSTITUTION, WHERE TRIAL COUNSEL, JOSEPH KENNELLY FAILED TO PURSUE A DEFENSE AND/OR PURSUE A LESSER INCLUDED OFFENSE OF INDUCEMENT TO COMMIT SUICIDE 720 ILCS 5/12-31 TO BE BROUGHT BEFORE A JURY FOR THEIR CONSIDERATION.

75) Trial counsel, Joseph Kennelly was made aware of the facts within Claim One prior to any pre-trial motions and/or trial by Petitioner and the witnesses whom have offered affidavits for Petitioner's original post-conviction petition.

76) Trial counsel, Kennelly failed to present a viable defense on behalf of Petitioner. Trial counsel, Kennelly offered only one witness in defense at trial and only asked the witness one question of relevance which pretained to the predominate hand of Petitioner and then rested. (Tr.I-198)

77) Trial counsel, Kennelly could have called witnesses and presented the evidence within Claim One herein to support an Inducement to Commit Suicide defense and/or pursue a lesser included offense of Inducement to Commit Suicide to be brought before a fair and impartial jury for their consideration.

78) To prevail on a claim of ineffective assistance of counsel a defendant must show both that counsel's representation was so deficient as to fall below an objective standard of reasonableness

under professional norms and that the deficient performance so prejudiced defendant as to deny him a fair trial. People v. Pitsonbarger, 2002 WL 1038729 (Ill.2002)

79) The first prong of the Strickland test the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Strickland v. Washington, 104 S.Ct. 2052 at 2064.

80) The second prong of the Strickland test the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result is reliable. Washington, 104 S.Ct. 2052 at 2064.

81) It is extremely clear that Petitioner has met the Statutory and Constitutional Requirements of Article 1 Section 2, Equal Protection Clause and Article 1 Section 11, Limitation of Penalties After Conviction Clause of the Illinois Constitution and the Statute for Inducement to Commit Suicide 720 ILCS 5/12-31 (a)(2)(ii) within Claim One herein to have prevailed at trial.

82) The failure to pursue a defense and/or pursue a lesser included offense of Inducement to Commit Suicide pursuant to 720 ILCS 5/12-31(a)(2)(ii) clearly demonstrates that trial counsel, Kennelly was deficient and that this error is so serious that trial counsel, Kennelly was not functioning as the "counsel" guaranteed by both the Illinois and United States Constitutions as to satisfy the first prong of the Strickland test.

83) The failure to pursue a defense and/or pursue a lesser included offense of Inducement to Commit Suicide pursuant to 720 ILCS 5/12-31(a)(2)(ii) clearly demonstrates that trial counsel, Kennelly was deficient and that the deficiency clearly prejudiced the defense. Had trial counsel, Kennelly presented a viable defense and/or pursued a lesser included offense of Inducement to Commit Suicide, Petitioner would have proceeded to a trial with a fair and impartial jury, instead of taking a bench trial and most certainly would have been convicted of the offense of Inducement to Commit Suicide instead of first degree murder.

84) Had trial counsel, Kennelly pursued the defense and/or pursued a lesser included offense of Inducement to Commit Suicide, Petitioner would have certainly prevailed in a conviction of Inducement to Commit Suicide and would have been sentenced to a term of one to three years imprisonment instead of the fifty year sentence imposed by the trial court for the offense of first degree murder. In doing so, trial counsel, Kennelly now subjects Petitioner to serve an additional forty eventto forty/ nine years incarceration within the Illinois Department of Corrections. This most definitely prejudiced Petitioner as to satisfy the second prong of the Strickland test.

85) Trial counsel, Kennelly is bound by the Illinois Rules of Professional Conduct and has a duty to stay apprised of new law. The Statutory Provision Petitioner now relays upon was enacted two years prior to Petitioner's offense and was available for a viable defense. Trial counsel, Kennelly's failure to utilize this Statute prejudice Petitioner.

CLAIM THREE

PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE 1 SECTION 2 OF THE ILLINOIS CONSTITUTION, WHERE DIRECT APPEAL COUNSEL, JAMES CHADD FAILED TO RAISE THE MERITORIOUS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AGAINST TRIAL COUNSEL FOR HIS FAILURE TO PURSUE A DEFENSE AND/OR PURSUE A LESSER INCLUDED OFFENSE OF INDUCEMENT TO COMMIT SUICIDE 720 ILCS 5/12-31 TO BE BROUGHT BEFORE A JURY FOR CONSIDERATION WITHIN PETITIONER'S DIRECT APPEAL.

86) Direct appeal counsel, James Chadd was made aware of the facts within Claim One herein prior to the filing Petitioner's direct appeal by Petitioner.

87) Direct appeal counsel, Chadd failed to present this meritorious claim within Petitioner's direct appeal.

88) Direct appeal counsel, Chadd could have incorporated the affidavits of the witnesses and showed the Appellate Court by way of the record (as Petitioner now does) that Petitioner was denied his Constitutional Rights secured by both the Illinois and United States Constitutions to have been afforded the opportunity of a defense and/or lesser include offense of Inducement to Commit Suicide 720 ILCS 5/12-31(a)(2)(ii) brought before a fair and impartial jury for their consideration. This most definitely would have demonstrated the ineffective assistance of counsel of trial counsel, Joseph Kennelly.

89) It is extremely clear that Petitioner has met the Statutory and Constitutional Requirements of Article 1 Section 2, Equal Protection Clause and Article 1 Section 11, Limitation of Penalties After Conviction Clause of the Illinois Constitution and the Statute for Inducement to Commit Suicide within Claim One to have prevailed at trial and to have been successful on direct appeal.



90) The failure to raise the meritorious claim of ineffective assistance of counsel against trial counsel Kennelly for his failure to pursue a defense and/or pursue a lesser included offense of Inducement to Commit Suicide 720 ILCS 5/12-31(a)(2)(ii) to be brought before a fair and impartial jury for their consideration within Petitioner's direct appeal was deficient and this error is so serious that direct appeal counsel, Chadd was not functioning as the "counsel" guaranteed by both the Illinois and United States Constitutions to satisfy the first prong of the Strickland test.

91) The failure to raise this meritorious claim within Petitioner's direct appeal clearly demonstrates that direct appeal counsel, Chadd was deficient and that the deficiency clearly prejudiced Petitioner's direct appeal. Had direct appeal counsel Chadd presented this meritorious claim within Petitioner's direct appeal, the Appellate Court would have reversed and remanded this cause for a new trial with instructions that Petitioner be afforded the opportunity of a lesser included offense of Inducement to Commit Suicide to be brought before a jury for consideration.

92) Had direct appeal counsel, Chadd raised this meritorious claim within Petitioner's direct appeal, Petitioner would have had his first degree murder conviction reversed and this cause would have been remanded back for a new trial with the instruction that Petitioner be afforded a lesser included offense of Inducement to Commit Suicide be brought to a fair and impartial jury for their consideration where Petitioner would have been convicted of the offense of Inducement to Commit Suicide instead of first

degree murder due to the overwhelming evidence which Petitioner now presents within Claim One.

93) Had direct appeal counsel, Chadd raised this meritorious claim within Petitioner's direct appeal, Petitioner would have been convicted of the offense of Inducement to Commit Suicide instead of first degree murder and would have been sentenced to a term of one to three years imprisonment instead of the fifty years imposed by the trial court. In doing so direct appeal counsel, Chadd now subjects Petitioner to serve an additional forty seven to forty nine years incarceration within the Illinois Department to Corrections. This is most definitely highly prejudicial to Petitioner to satisfy the second prong of the Strickland test.

94) Direct appeal counsel, Chadd is bound by the Illinois Rules of Professional Conduct and has a duty to stay apprised of new law. The Statutory Provision Petitioner now relies upon was enacted two years prior to Petitioner's offense and was available for a viable defense. Direct appeal counsel, Chadd's failure to utilize this Statute and raise the claim of ineffective assistance of counsel against trial counsel prejudiced Petitioner.

#### CLAIM FOUR

PETITIONER WAS DENIED A REASONABLE LEVEL OF ASSISTANCE OF COUNSEL, IN VIOLATION OF THE POST-CONVICTION HEARING ACT 725 ILCS 5/122-1, WHERE POST-CONVICTION COUNSEL, DEBORAH J. GUBIN FAILED TO RAISE THE MERITORIOUS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AGAINST DIRECT APPEAL COUNSEL, JAMES CHADD FOR HIS FAILURE TO RAISE THE MERITORIOUS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AGAINST TRIAL COUNSEL, JOSEPH KENNELLY FOR HIS FAILURE TO PURSUE A DEFENSE AND/OR PURSUE A LESSER INCLUDED OFFENSE OF INDUCEMENT TO COMMIT SUICIDE PURSUANT TO 720 ILCS 5/12-31(a)(2)(ii) TO BE BROUGHT BEFORE A FAIR AND IMPARTIAL JURY FOR THEIR CONSIDERATION WITHIN PETITIONER'S DIRECT APPEAL.

95) Post-conviction counsel, Deborah J. Gubin was made aware of the facts within Claim One herein prior to her filing an amended and/or amendment to the amended post-conviction petition on behalf of Petitioner by Petitioner.

96) Post-conviction counsel, Gubin also had the opportunity to review the record and Petitioner's original post-conviction petition which included the facts that Petitioner now relies upon within Claim One.

97) Post-conviction counsel, Gubin could have raised this meritorious claim within her amended and/or amendment to the amended post-conviction petition to show how Petitioner's Constitutional Rights under Due Process and Equal Protection Clauses of the Illinois and United States Constitutions were violated.

98) Post-conviction counsel, Gubin also could have incorporated the affidavits of the witnesses and used the record to demonstrate to the trial court (as Petitioner now does) as to how Petitioner was denied the Constitutional Rights secured by both the Illinois and United States Constitutions to have been afforded the Right to a defense and/or a lesser included offense of Inducement to Commit Suicide pursuant to 720 ILCS 5/12-31(a)(2)(ii) brought before a fair and impartial jury for their consideration. This clearly demonstrates that post-conviction counsel, Gubin was ineffective.

99) It is extremely clear that Petitioner has met the Statutory and Constitutional Requirements of Article 1 Section 2, Equal Protection Clause and Article 1 Section 11, Limitation of Penalties After Conviction Clause of the Illinois Constitution and the Statute for the offense of Inducement to Commit Suicide 720

ILCS 5/12-31(a)(2)(ii) within Claim One herein to have prevailed at trial and to have been successful on direct appeal and post-conviction relief.

100) The failure to raise this meritorious claim within Petitioner's post-conviction counsel, Gubin's amended and/or amendment to the amended post-conviction petition clearly demonstrates to this Honorable Court that post-conviction counsel, Gubin was well below the reasonable level of assistance required by the Post-Conviction Hearing Act 725 ILCS 5/122-1.

101) Had post-conviction counsel, Gubin raised this meritorious claim herein within Petitioner's amended and/or amendment to the amended post-conviction petition, Petitioner's first degree murder conviction would have been reverse and this cause would have been sent back for a new trial with the instructions that Petitioner be afforded a lesser included offense of Inducement to Commit Suicide 720 ILCS 5/12-31(a)(2)(ii) be presented to a fair and impartial jury for their consideration and where Petitioner would have proceeded to trial before a fair and impartial jury instead of proceeding to a bench trial where Petitioner would have been convicted of the offense of Inducement to Commit Suicide instead of first degree murder due to the overwhelming evidence which Petitioner presented within Claim One herein.

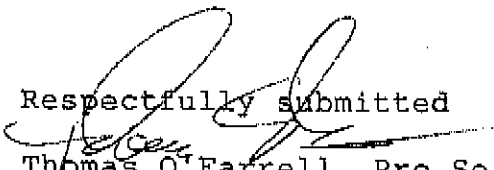
102) Had post-conviction counsel, Gubin presented this meritorious claim within Petitioner's amended and/or amendment of the amended post-conviction petition, Petitioner would have prevailed in a conviction for the offense of Inducement to Commit Suicide and would have been sentenced to a term of one to three

years imprisonment instead of the fifty years imposed by the trial court for the offense of first degree murder. In doing so post-conviction counsel, Gubin now subjects Petitioner to serve an additional forty seven to forty nine years incarceration in the Illinois Department of Corrections. This in its self is highly prejudicial to Petitioner.

103) Post-conviction counsel, Gubin is also bound by the Illinois Rules of Professional Conduct and also has a duty to stay apprised of new law. The Statutory Privion Petitioner now relays upon was enacted two years prior to Petitioner's offense and was available for a viable defense. Post-conviction counsel Gubin's failure to utilize this Statue and raise they claims of ineffective assistance of counsel against trial and direct appeal counsel severely prejudiced Petitioner.

104) Petitioner offers the following remedy, and respectfully moves this Honorable Court to grant relief in reversing and remanding this cause for a new trial with the instruction that Petitioner be afforded a lesser included offense of Inducement to Commit Suicide pursuant to 720 ILCS 5/12-31(a)(2)(ii) be brought to a fair and impartial jury for their consideration.

Wherefore, based upon the foregoing, Petitioner, Thomas O'Farrell respectfully moves this Honorable Court to deem this petition not frivolous, hold an evidentiary hearing on any contested aspect of this petition, vacate the judgement of conviction and sentence, and grant post-conviction relief in the form as mentioned above.

Respectfully submitted  
  
 Thomas O'Farrell, Pro-Se  
 Defendant-Petitioner



IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS,

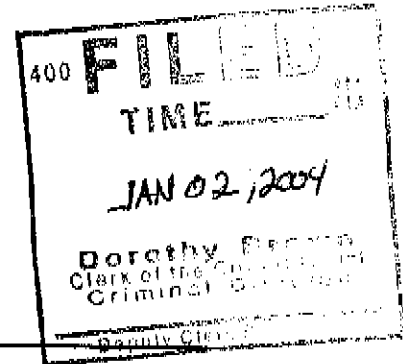
Plaintiff-Respondent,

-vs-

THOMAS O'FARRELL,

Defendant-Petitioner.

Post-Conviction  
95 CR 30463



ORDER

In this third petition for post-conviction relief, Thomas O'Farrell once more seeks redress from the judgment of conviction entered herein on February 24, 1997. On that occasion, this court sentenced O'Farrell to a term of 50 years imprisonment after finding him guilty of first degree murder, in violation of section 9-1A of the Illinois Criminal Code, 720 ILCS 5/9-1A (West 1992). As grounds for relief, petitioner alleges that he was denied the effective assistance of counsel where counsel at all stages of the proceedings failed to argue that petitioner's conduct at worst, constituted the lesser-included offense of inducement to commit suicide.

### PROCEDURAL HISTORY

The factual background underlying petitioner's murder conviction has been recounted in the decision of the appellate court on direct appeal as well as in the two previous orders of this court dismissing petitioner's first and second petitions for post-conviction relief. Suffice it to say, petitioner was convicted for the intentional and knowing murder of his wife on September 28, 1995, as she lay in her bed inside the family home located on the northwest side of the City of Chicago. In the capital sentencing hearing that followed, this court determined that the State had failed to establish that the murder had been committed in cold, calculated and premeditated manner pursuant to a preconceived plan. Alternatively, petitioner was sentenced to a term of 50 years imprisonment.

As noted, a direct appeal was taken to the Illinois Appellate court, wherein petitioner asserted that:

- 1) he received an excessive sentence;
- 2) the mittimus should be amended to reflect that he was convicted and sentenced for only one count of first degree murder; and
- 3) he should not have been subject to the truth-in-sentencing law because it violated the single-subject rule of the Illinois Constitution.

In affirming petitioner's conviction, while rejecting claims one and two, the reviewing court, by its order of March 24, 1999, modified the mittimus in conformity with *People v. Reedy*, 295 Ill. App.3d 34, 44, 692 N.E.2d 376 (1998), to reflect petitioner's entitlement to receive one day of good conduct credit for each day of service in prison. *People v. Thomas O'Farrell*, No. 1-97-0911 (1999) (unpublished order under Supreme court Rule 23).



Petitioner sought further review in the Illinois Supreme Court, however his petition for leave to appeal was denied on February 2, 2000. See, *People v. O'Farrell*, 187 Ill.2d 585, 724 N.E.2d 1273 (2000). The record does not reflect whether he proceeded further by way of *certiorari* in the United States Supreme Court.

However, Petitioner did seek collateral relief in a motion for writ of habeas corpus filed in this court on October 25, 1999. In that proceeding, O'Farrell claimed that because he had not been prosecuted by the State of Illinois, but rather by the Cook County Court, a home rule unit, his conviction and ensuing imprisonment constituted an unlawful and unconstitutional detention. Following due consideration, this court by its order of November 2, 1999, rejected the claim for habeas corpus relief. Although petitioner initially appealed this order, the appellate court subsequently allowed his motion to withdraw the appeal.

Petitioner also sought collateral relief in a post-conviction proceeding commenced in this court on January 26, 2000. Following appointment of counsel, an amended petition for post-conviction relief was filed asserting that counsel's representation in the earlier proceedings was ineffective in that:

- 1) trial counsel's presentation and argument of the motion to quash arrest and suppress evidence and motion to suppress physical evidence was inadequate;
- 2) trial counsel failed to present meritorious evidence to support entry of the lesser judgment of second degree murder;
- 3) trial counsel failed to adequately prepare for and represent petitioner at the sentencing hearing;
- 4) appellate counsel failed to raise the following issues on appeal:

- the denial of the motion to quash arrest and suppress evidence,
- the denial of the motion to suppress physical evidence;
- trial counsel's ineffective representation at trial and at the sentencing hearing;
- the denial of the motion for additional discovery concerning Mr. Dye; and
- prosecutorial misconduct concerning the use of Mr. Dye at sentencing.

Additionally, petitioner raised this court's alleged error in allowing Mr. Dye to testify without insuring that all *Brady* material had been tendered to the defense. On May 7, 2001, counsel filed an amendment to the amended petition, adding the claim of excessive sentence.

Thereafter, respondent moved to dismiss the proceeding asserting that the amended petition failed to raise any constitutional questions within the purview of the Post-Conviction Hearing Act, that the claims presented were barred by the doctrines of *res judicata* and waiver, and that the petition failed to establish the requisite deficient performance and resulting prejudice to support a claim of ineffective assistance of counsel. On October 4, 2001, by its written order of 16 pages, this court granted the motion to dismiss. An examination of this court's records as well as the appellate court reveals that no appeal was taken from the dismissal order.

Nonetheless, on May 27, 2003, Mr. O'Farrell filed a second petition for post-conviction relief. In his *pro se* filing O'Farrell claimed that his post-conviction counsel was deficient by reason of her failure to include in the amended petition the following issues, each of which he argued had been properly raised in his original *pro se* petition:

- 1) that trial counsel failed to present additional evidence at the suppression hearing proving that petitioner's confession was illegally obtained;
- 2) that post-conviction counsel was grossly inadequate by her failure to honor petitioner's direction to raise and present his meritorious claim that the evidence supported a conviction for the lesser offense of second degree murder; and
- 3) that post-conviction counsel was grossly inadequate by her failure to perfect a timely notice of appeal following dismissal of petitioner's original post-conviction petition, after being instructed to do so by petitioner.

In its analysis of O'Farrell's petition, this court noted that the filing constituted a successive petition under the holding of *People v. Flores*, 153 Ill.2d 264, 606 N.E.2d 1078 (1992). Applying the rationale of *People v. Pitsonbarger*, 265 Ill.2d 444, 793 N.E.2d 609 (2002), the court by its 15 page order of July 24, 2003, summarily dismissed the proceeding. An appeal was taken by petitioner and is presently pending in the Illinois Appellate Court, First Judicial District under number, 1-03-3404.

#### ANALYSIS

The court recognizes its duty to examine the instant petition and make a determination of its legal sufficiency pursuant to Section 122-2.1 of the Post-Conviction Hearing Act ("Act"). 725 ILCS 5/122-2.1 (West 2003); *People v. Holiday*, 313 Ill.App.3d 1046, 1048, 732 N.E.2d 1, 2 (4<sup>th</sup> Dist.2000). A post-conviction petition is a collateral attack on prior conviction and sentencing. *People v. Simms*, 192 Ill.2d 348, 359, 736 N.E.2d 1092, 1105 (2000). Under the act, a defendant may challenge his conviction or sentence for violations of federal or state constitutional rights. *People v. King*, 192 Ill.2d 189, 192, 735 N.E.2d 569, 572 (2000). However, the court is also empowered to summarily dismiss non-meritorious claims raised by the defendant. *People v. Richardson*, 189 Ill.2d 401, 407, 727 N.E.2d 362, 367 (2000).

Application of well-established principles yields the conclusion that O'Farrell's claim of ineffective assistance of counsel is barred by the doctrine of waiver. As noted, this is petitioner's third petition for post-conviction relief. However, the Post-Conviction Hearing Act generally limits a prisoner to the filing of only one such petition. *People v. Holman*, 191 Ill.2d 204, 209, 730 N.E.2d 39, 43 (2000). Indeed, "a ruling on an initial post-conviction petition has *res judicata* effect with respect to all claims that were raised or could have been raised in the initial petition." *People v. Jones*, 191 Ill.2d 354, 358, 732 N.E.2d 573, 575 (2000); *see also* 725 ILCS 5/122-3 (West 2001). Thus, as a threshold matter, this court must determine whether the waiver rule should be relaxed and petitioner's successive claims be considered.

A narrow exception to the waiver rule holds that a claim brought in a successive petition will be considered if the prior proceedings were deficient in some fundamental way. *People v. Britt-El*, 206 Ill.2d 331, 339, 794 N.E.2d 204, 209 (2002). Petitioner recognizes that the Illinois Supreme Court has determined that the "cause-and-prejudice test" is the analytical tool that courts should use to determine whether fundamental fairness requires that an exception to the waiver rule be made and successive claims be considered on their merits. *Pitsonbarger*, 205 Ill.2d at 463, 793 N.E.2d at 623. For purposes of the "cause-and-prejudice test," "cause" is defined as "some objective factor external to the defense [that] impeded counsel's efforts to raise the claim in an earlier proceeding." *Pitsonbarger*, 205 Ill.2d at 462, 793 N.E.2d at 622 (*quoting Flores*, 153 Ill.2d at 279, 606 N.E.2d at 1085). "Prejudice" will be found where "the petitioner [was] denied consideration of an error that so infected the entire trial that the resulting

conviction or sentence violates due process." *Pitsonbarger*, 205 Ill.2d at 464, 793 N.E.2d at 624 (quoting *Flores*, at *id.*).

This new mechanism for evaluating successive claims shifts the focus from the sufficiency of the original post-conviction proceeding to whether the petitioner had the ability to raise the successive claim in that initial proceeding. Thus, the court held that, rather than focusing on whether a successive petition will be allowed, trial judges should apply the cause-and-prejudice test to individual claims. *Pitsonbarger*, 205 Ill.2d at 462, 793 N.E.2d at 622. In other words, "the petitioner 'must show how the deficiency in the first proceeding affected his ability to raise each specific claim.'" *People v. Thompson*, 331 Ill.App.3d 948, 954, 773 N.E.2d 15, 20 (1<sup>st</sup> Dist. 2002) (Quoting *Pitsonbarger*, 205 Ill.2d at 463, 793 N.E.2d at 623).

In the present case, petitioner again fails to demonstrate that fundamental fairness requires relaxation of the waiver rule and consideration of his claims of ineffective assistance of trial, appellate or post-conviction counsel. O'Farrell articulates no reason why he could not have raised these claims in his two prior petitions for post-conviction relief. Although the factual assertions relied upon by O'Farrell in support of his claims were available to him at the time the earlier petitions were filed, he has failed to identify any external factor which impeded his effort to raise them in those proceedings. Petitioner does not allege that the facts that provide the basis for his claims were withheld from him or that the claims are based on newly discovered evidence. Rather, the claims were not included in the earlier petitions because of post-conviction counsels' derelictions and because petitioner's purported disabilities affected his ability to raise his

claims in prior proceedings. Thus, petitioner has failed to establish that "cause" prevented him from making his claims in the two prior filings.

It is likewise apparent that petitioner has failed to demonstrate that any "prejudice" inured from the failure to assert these claims earlier. Simply put, had they been presented earlier, there is scant probability that petitioner would have prevailed. In the instant petition O'Farrell expounds upon his perception that the evidence giving rise to his conviction lead to the inescapable conclusion that his conduct at worst constituted the offense of inducement to commit suicide, 720 ILCS 5/12-31 (West 1992), and not first degree murder. The statute provides:

- (a) A person commits the offense of inducement to commit suicide when he or she does either of the following:
  - (1) Coerces another to commit suicide and the other person commits or attempts to commit suicide as a direct result of the coercion, and he or she exercises substantial control over the other person through (i) control of the other person's physical location or circumstances; (ii) use of psychological pressure; or (iii) use of actual or ostensible religious, political, social, philosophical or other principles.
  - (2) With knowledge that another person intends to commit or attempts to commit suicide, intentionally (i) offers and provides the physical means by which another person commits or attempts to commit suicide, or (ii) participates in the physical act by which another person commits or attempts suicide.

For the purpose of this Section, "attempts to commit suicide" means any act done with the intent to commit suicide and which substantial steps toward commission of suicide.
- (b) Sentence.
 

Inducement to commit suicide under paragraph (a) (1) when the other person commits suicide as a direct result of the coercion is a Class 2 felony. Inducement to commit suicide under paragraph (a) (2) when the other person commits suicide as a direct of the assistance provided is a Class 4 felony.

Petitioner clearly misapprehends the thrust of the statute. Contrary to petitioner's analysis, the enactment cannot be construed as a lesser-included offense of first-degree murder. A lesser included offense is "an offense which is established by the same or less than all of the facts or a less culpable mental state (or both), than that which is required to establish the commission of the offense charged...." 720 ILCS 5/2-9 (a) (West 2003). The offense of homicide requires that the defendant intentionally or knowingly kill the victim (720 ILCS 5/9-1 (a) (1) (West 2003)), while the offense of inducement to commit suicide merely requires that the defendant either coerce the victim to committing suicide or provide the means for such. 720 ILCS 5/12-31 (West 2003). Furthermore, this court has found no decision in which an Illinois court has held that inducement to commit suicide is a lesser-included offense of murder. Moreover, a clear reading of the statute demonstrates that its prescriptions focus upon situations where "another person commits or attempts to commit suicide." Most assuredly, the evidence refutes any suggestion that this was the situation at bar. The victim, Lesley O'Farrell, did not commit or attempt to commit suicide. Rather, as this court found, petitioner shot and killed his wife as she lay helpless in her bed. Petitioner's belated suicide claim followed on the heels of the rejection of his initial "black intruder" defense and was similarly bereft of any hint of believability.

Clearly, petitioner not only has failed to demonstrate that that he has satisfied *Pitsonbarger's* "cause and prejudice test," but has also failed to establish that trial, appellate or post-conviction counsel were ineffective in failing to interpose and argue this defense. In assessing such claims, Illinois adheres to the often noted test of *Strickland v. Washington*, 466 U.S. 668, 687, 80 L.Ed.2d 674, 693, 104 S.Ct. 2052, 2064 (1984).

Under this standard, petitioner must show that counsel's representation fell below an objective standard of reasonableness, and that, but for this deficiency, there is a reasonable probability that counsel's performance was prejudicial to the defense. *People v. Albanese*, 104 Ill.2d 504, 525-26, 473 N.E.2d 1246, 1255 (1984). Here, as noted, there is no reasonable probability that had the inducement to commit suicide defense been interposed at any stage of the proceedings, a different result would have obtained.

### CONCLUSION

Based upon the foregoing discussion, the court finds petitioner's claim is frivolous and patently without merit. Accordingly, this successive petition for post-conviction relief shall be and is hereby dismissed. Likewise, Mr. O'Farrell's motion for leave to proceed *in forma pauperis* and for appointment of counsel is denied.

ENTERED: \_\_\_\_\_

DATED: \_\_\_\_\_





No. 1-04-1094

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, ) Appeal from the Circuit Court  
Respondent-Appellee, ) of Cook County, Illinois.  
-vs- ) No. 95 CR 30463.  
THOMAS O'FARRELL, ) Honorable  
Petitioner-Appellant. ) Michael P. Toomin,  
Judge Presiding.

**MOTION TO WITHDRAW AS COUNSEL ON APPEAL  
PURSUANT TO *PENNSYLVANIA V. FINLEY***

The Office of the State Appellate Defender, by Michael J. Pelletier, Deputy Defender, and Kari K. Firebaugh, Assistant Appellate Defender, moves for leave to withdraw as counsel for Appellant, Thomas O'Farrell, in this cause.

In support of this motion Kari K. Firebaugh, Assistant Appellate Defender, states:

1. Petitioner-Appellant, Thomas O'Farrell was sentenced to 50 years in prison for first degree murder on January 28, 1997. Appellant is currently incarcerated. His conviction and sentence were affirmed on direct appeal in *People v. O'Farrell*, No. 1-97-0911 (1<sup>st</sup> Dist. March 24, 1999) (Rule 23 Order).

2. On November 7, 2003, Petitioner-Appellant filed a petition for post-conviction relief. The petition was denied by the circuit court on January 2, 2004.

EXHIBIT AA

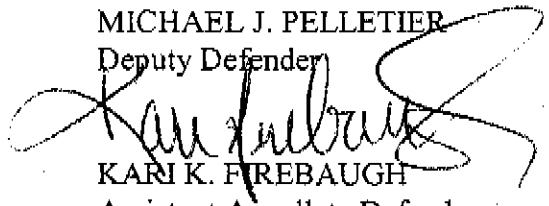
3. Notice of appeal was mailed on January 8, 2004, and filed by the clerk of the circuit court on April 13, 2004. The Office of the State Appellate Defender was appointed.

4. After an examination of the record on appeal, and after discussing the case with another attorney in the office who also read the record on appeal, counsel has concluded that an appeal in this cause would be frivolous. Counsel has informed petitioner of this conclusion and that counsel intends to file the motion to withdraw. Therefore, counsel hereby moves to withdraw as counsel on appeal pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). A memorandum supporting this motion is attached.

WHEREFORE, the Office of the State Appellate Defender respectfully moves to withdraw as counsel on appeal in this cause.

Respectfully submitted,

MICHAEL J. PELLETIER  
Deputy Defender



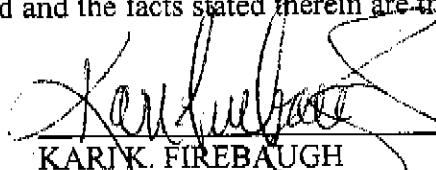
KARI K. FIREBAUGH  
Assistant Appellate Defender  
Office of the State Appellate Defender  
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COUNSEL FOR PETITIONER-APPELLANT

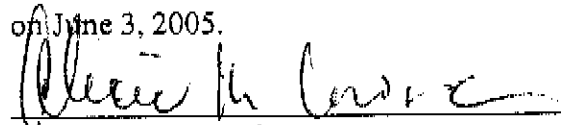
STATE OF ILLINOIS     )  
                                      )   SS  
COUNTY OF COOK     )

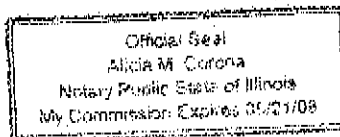
**AFFIDAVIT**

Kari K. Firebaugh, being first duly sworn on oath, deposes and says that she has read the foregoing Motion by her subscribed and the facts stated therein are true and correct to the best of her knowledge and belief.

  
\_\_\_\_\_  
KARI K. FIREBAUGH  
Assistant Appellate Defender

SUBSCRIBED AND SWORN TO BEFORE ME  
on June 3, 2005.

  
\_\_\_\_\_  
NOTARY PUBLIC



No. 1-04-1094

IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County, Illinois.
Respondent-Appellee,	)	
	)	
-vs-	)	No. 95 CR 30463.
	)	
THOMAS O'FARRELL,	)	Honorable
	)	Michael P. Toomin,
Petitioner-Appellant.	)	Judge Presiding.

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**MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO WITHDRAW AS  
COUNSEL ON APPEAL**

I.

**STATEMENT OF FACTS**

Following a bench trial, Thomas O'Farrell was convicted of first degree murder. (T.R.-I-209-210)<sup>1</sup>. On January 28, 1997, Mr. O'Farrell was sentenced to a term of 50 years

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<sup>1</sup> The volumes of the record will be cited as follows:

- C: Current Post-Conviction Common Law Record
- R: Current Post-Conviction Report of Proceedings
- P.C.: Prior Post-Conviction Common Law Record
- P.R.: Prior Post-Conviction Report of Proceedings
- S.R.Vol.I: Supplemental Post-Conviction Common Law Record
- S.R.Vol.II: Supplemental Post-Conviction Common Law Record
- S.R.Vol.III: Supplemental Post-Conviction Report of Proceedings
- S.R.Vol.IV: Supplemental Post-Conviction Report of Proceedings

imprisonment. (T.R.-K-87).

### **Trial**

Officer Pettry testified that on September 28, 1993, around 4:20 a.m., she and her partner, Officer Maderer, received a flash message that a man had been shot and there was a burglary in progress at 3435 Ardmore. (T.R.I-20-22). Pettry and Maderer arrived a few minutes later, and noticed that the door to the house was open and Mr. O'Farrell was sitting inside at the base of the stairs with his son. (T.R.I-21-23). When O'Farrell saw the officers, he said "Get the hell in here," he was agitated, and his shirt was blood-stained. (T.R.I-24). O'Farrell told Pettry that he and his wife had been shot by an intruder, whom he described as a 200-pound black male with short black hair, and that his wife was in the upstairs bedroom. (T.R.I-25-26). Maderer asked O'Farrell if he could search for the intruder, and then went upstairs. (T.R.I-27).

At this point, O'Farrell told Pettry that he had been awakened by a gunshot, saw the intruder, and struggled with him into the hallway. (T.R.I-28). During the struggle, O'Farrell was shot, and he thought that the intruder had also been shot in the stomach. (T.R.I-28). O'Farrell told Pettry that the intruder had entered his home through the first floor bathroom window. (T.R.I-39, 41). When Maderer came downstairs, Pettry searched the first floor, but found no one inside the home and while upstairs, saw several pictures on the hallway floor and O'Farrell's wife lying on the bed in the master bedroom. (T.R.I-29-32). Mrs. O'Farrell had gunshot wounds in her head

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S.R.Vol.V: Supplemental Post-Conviction Common Law Record  
S.R.Vol.VI: Supplemental Trial Common Law Record  
S.R.Vol.VII: Current Supplemental Post-Conviction Common Law Record  
S.R.Vol.VIII: Current Supplemental Post-Conviction Common Law Record  
T.C.: Trial Common Law Record  
T.R.: Trial Report of Proceedings

and chest, and there were two bullet holes with black residue surrounding them on a pillow near her feet. (T.R.I-30-32). An ambulance eventually came and took O'Farrell to the hospital. (T.R.I-32-35).

On the way to the hospital, O'Farrell told Officer Cooper that he had been awakened by two gunshots, saw a black male standing over his wife, and struggled with him into the hallway. (T.R.I-43-50). During the struggle, O'Farrell was shot in the shoulder, and he believed that the intruder was shot in the stomach. (T.R.I-50). O'Farrell fell over one of his dogs when they came out into the hallway, and the intruder ran down the stairs and out the back door near the kitchen. (T.R.I-50-51). O'Farrell noticed that the intruder was bent over, holding his abdomen as he ran. (T.R.I-50-51).

Detective Kernan interviewed O'Farrell in the emergency room around 4:30 a.m. (T.R.I-58-60). O'Farrell told Kernan that on the previous night he had left work at 10:30 p.m., stopped at a bar for a few beers, and left the bar at 11:30 p.m. (T.R.I-61). When he arrived home shortly after midnight, O'Farrell spoke with his wife, who was in bed but awake, and then fell asleep. (T.R.I-61-62). O'Farrell was awakened by two gunshots, saw an intruder standing over his wife, and then struggled with the intruder. (T.R.I-62-63). During the struggle, both he and the intruder were shot, and his son opened his bedroom door letting one of the dogs out into the hallway. (T.R.I-62-63). O'Farrell tripped over the dog, and the intruder ran down the stairs and out the back door. (T.R.I-63). O'Farrell called the police from the kitchen and then went upstairs to his bedroom, where he saw that his wife had been shot in the head and chest. (T.R.I-64). After five minutes passed, O'Farrell called the police again and then called his dad. (T.R.I-64).

Detective Collins testified that he arrived at 3435 Ardmore sometime between 5:00 and

6:30 a.m., and noticed a television in the corner of the master bedroom sitting on top of a stand. (T.R.I-117-120, 122-123). When he went to look behind it, Collins' foot bumped the bottom of the stand and the door swung open, causing a video cassette box entitled A Nightmare Before Christmas to fall out and pop open at his feet. (T.R.I-119-120, 123). Both Collins and evidence technician, Patrick Moran, saw that the box contained a .22 caliber derringer pistol, three discharged .22 caliber shell casings, one live .22 caliber cartridge, and a hypodermic needle. (T.R.I-89-90, 101-103, 114-115, 119-120). Moran additionally testified that the glass pane from the window in the first floor bathroom was on the lawn, a pile of flag stone and pieces of lumber were below the window, picture frames were on the hallway floor, and a bullet hole was in the hallway wall approximately the same height as the wound to O'Farrell's shoulder. (T.R.I-73-74, 81, 95-100, 109-110).

O'Farrell was transported by officers from the hospital to Area Five. (T.R.I-152-153). Detective Schak was assigned to continue the investigation, and around 8:30 or 9:00 a.m., learned that a derringer had been recovered from a video cassette box in the bedroom. (T.R.I-143-144). After receiving this information, Schak asked O'Farrell if he owned a gun or if there was any reason for one to be in his home, to which O'Farrell responded, "No." (T.R.I-144, 146). When Schak asked O'Farrell whether the Nightmare Before Christmas meant anything to him, O'Farrell became attentive and alert, and Schak told O'Farrell that he was now a suspect in the death of his wife and advised him of his rights. (T.R.I-146-148).

O'Farrell told Schak that he left work around 11:30 p.m., went to a bar, and had a few drinks, and when he went home, his wife pleaded with him to shoot her after she fell asleep, and he agreed. (T.R.I-149-150). O'Farrell's wife had diabetes, kidney failure, had been recently



diagnosed with Bell's Palsy, and tried to commit suicide six months before by overdosing on her insulin. (T.R.I-149). O'Farrell told Schak that he and his wife made a loose plan, his wife provided the weapon, and she told him that she had taken the glass out of the bathroom window. (T.R.I-149-150). His wife woke up several times and asked him why he had not taken her life. (T.R.I-150). At 4:00 a.m., O'Farrell shot her in the head through a pillow. (T.R.I-151). His wife began quivering and moving around, so O'Farrell shot her in the chest. (T.R.I-151). At this point, his wife stopped moving. (T.R.I-151). O'Farrell told Schak that he fired into the hallway and shot himself in the shoulder because he thought it would look better. (T.R.I-152). O'Farrell put the gun in the video cassette box, made some phone calls, and then went downstairs, opened the front door, and waited for the police to arrive. (T.R.I-152).

Assistant State's Attorney Kougas testified that he went to Area Five between 10:45 and 11:00 a.m, and learned that O'Farrell had made a statement. (T.R.I-178, 190-191). Around 11:40 a.m., Kougas spoke to O'Farrell with Schak present and O'Farrell related basically the same version of events that he had earlier related to Schak. (T.R.I-178-187, 192-195). In the version related to Kougas, O'Farrell added that he and his wife had argued in the past about her requests that he end her life and he believed that she was terminally ill. (T.R.I. 182, 192). In addition, O'Farrell told Schak that his wife had come up with the plan the night before and created the story about the black male intruder. (T.R.I-182-183). O'Farrell further stated that after the shooting, he went downstairs, broke the screen door, and pushed the window out in the bathroom. (T.R.I-156, 185, 194-195).

The parties stipulated that Nancy Jones, an expert in the area of forensic pathology, would testify that she performed an autopsy on Leslie O'Farrell, and it was her opinion that she died of

multiple gunshot wounds. (T.R.I-158-160).

Dick Chenow, an expert in firearms identification employed by the Chicago Police Department Crime Lab, testified that one of the bullets recovered during the autopsy had class characteristics that were consistent with the bullets test fired from the gun found in the video cassette box, but there were no individual characteristics that could positively show that the bullet had been fired from that gun. (T.R.I-163-172). The derringer was a single shot gun, which had to be reloaded every time that it was fired. (T.R.I-173-174).

Robert Berk, a trace evidence analyst employed by the Chicago Police Department Crime Lab, testified that there was gun shot residue on O'Farrell's left hand, which could be consistent with a struggle over a weapon. (T.R.I-135-141). Defendant's father, Thomas O'Farrell, testified that his son is right handed. (T.R.I-198).

#### **Direct Appeal**

On direct appeal, O'Farrell argued that: (1) his sentence was excessive; (2) the truth-in-sentencing law violated the single subject rule of the Illinois Constitution; and (3) the mittimus should be amended to reflect that he was convicted and sentenced for only one count of first degree murder. (P.C.-110-119; S.R.Vol.I-2-31, 69-83). On March 24, 1999, in Appellate Court Number 1-97-0911, this court affirmed O'Farrell's conviction and sentence, but amended the mittimus to reflect that he was to receive one day of good conduct credit for each day in prison. (P.C.-110-119). O'Farrell's petition for rehearing, petition for leave to appeal, and petition for writ of habeas corpus were denied. (P.C.-30-31; S.R.Vol.I-100, 147).

#### **Post-Conviction Proceedings**

On January 26, 2000, O'Farrell filed his first *pro se* post-conviction petition in which he

raised various claims of ineffective assistance of trial counsel. (P.C.-29-148). O'Farrell also filed a *pro se* motion for substitution of judge, which the circuit court denied on February 15, 2000. (S.R.Vol.I-124; S.R.Vol.IV-18). Private counsel was appointed to represent O'Farrell, and on April 13, 2001, an amended post-conviction petition was filed. (P.C.-149-224). In this petition, O'Farrell raised various allegations of trial court error and ineffective assistance of counsel. (P.C.-149-224). On May 8, 2001, an amendment to the amended petition was filed in which O'Farrell raised an additional ineffective assistance of counsel claim. (P.C.-225-229).

The circuit court granted the State's motion to dismiss O'Farrell's petitions on October 4, 2001. (S.R.Vol.I-142-155; S.R.Vol.II-2-19; S.R.Vol.III-4-26; S.R.Vol.IV-32, 36-37, 40-41; S.R.Vol.VII-3-7). In doing so, the court found that several of the claims O'Farrell raised were barred by the doctrines of waiver and *res judicata* and O'Farrell failed to make a substantial showing that his constitutional rights were violated either at trial or on direct appeal. (S.R.Vol.I-142-155; S.R.Vol.IV-40-41). On November 1, 2001, O'Farrell mailed several documents to the circuit court clerk, including a document entitled Affidavit of Intent to File an Appeal to the Appellate Court of Illinois, First Judicial District, which neither the clerk nor the circuit court recognized as a notice of appeal. (S.R.Vol.II-26-36).

O'Farrell filed his second *pro se* post-conviction petition on May 27, 2003, which was dismissed by the circuit court on July 24, 2003. (P.C.-17-270). Upon review of the record in this appeal, appellate counsel became aware of the clerk's failure to recognize O'Farrell's notice of intent as a notice of appeal and, on August 24, 2004, filed a motion asking this court to allow O'Farrell leave to file a late notice of appeal, which this court granted on September 7, 2004. (S.R.Vol.II-20-38). The appeal from the dismissal of O'Farrell's second post-conviction petition.

was subsequently dismissed as moot, and O'Farrell's appeal from the dismissal of his initial post-conviction petitions is currently pending before this court in Appellate Court Number 1-04-2481.

On November 7, 2003, O'Farrell filed his third *pro se* post-conviction petition. (C-2-33). In this petition, O'Farrell maintained that he should have been charged and sentenced for the offense of inducement to commit suicide pursuant to 720 ILCS 5/12-31 (West 2002), which carries a sentencing range of one to three years imprisonment. (C-8-28). O'Farrell argued that trial counsel was ineffective for failing to present this as a defense or lesser included offense to first degree murder, appellate counsel was ineffective for failing to raise trial counsel's ineffective assistance, and post-conviction counsel did not provide a reasonable level of assistance because she failed to raise both trial and appellate counsel's ineffective assistance in her amended petition. (C-8-28). O'Farrell additionally argued that fundamental fairness required that the court address his claims because he was prevented from raising them in an earlier proceeding and would be prejudiced. (C-4-7). In support of this petition, O'Farrell attached his own affidavit, the affidavit of his father, and the affidavit of another inmate which all attested to the fact that he was severely dyslexic and had trouble reading and writing. (C-29-31). O'Farrell also attached an article titled, "Assisted Suicide Laws Around the World." (C-32-33).

On January 2, 2004, the circuit court summarily dismissed O'Farrell's petition, finding that the claims O'Farrell raised were barred by the doctrine of waiver and were frivolous and without merit. (C-34-43; R-4).

## II.

**LEGAL ANALYSIS**

Counsel has considered raising the following issue on Mr. O'Farrell's behalf:

**The Circuit Court Erred When it Summarily Dismissed**

**Mr. O'Farrell's *Pro Se* Post-Conviction Petition Based on**

**The Doctrine of Waiver.**

In dismissing Mr. O'Farrell's post-conviction petition, the circuit court stated that the petition was frivolous and without merit, pursuant to 725 ILCS 122-2.1. (R-4). In its written order, the circuit court reiterated this finding but also found that this petition was barred by waiver. (C-34-43). Specifically, the court found that Mr. O'Farrell's petition did not pass the "cause and prejudice test," set out in *People v. Pitsonbarger*, 205 Ill. 2d 444, 793 N.E.2d 609 (2002), a test used to determine whether waiver should apply to a successive petition. (C-34-43).

Appellate counsel considered arguing that the circuit court exceeded the parameters of permissible review in first stage proceedings by basing its ruling, in part, on matters outside the allegations of the petition since at the initial stage of post-conviction proceedings, the court should only determine the post-conviction petition's substantive value and not its procedural compliance. *People v. Bocclair*, 202 Ill. 2d 89, 101-102, 789 N.E.2d 734 (2002); *People v. Edwards*, 197 Ill. 2d 239, 244, 757 N.E.2d 442 (2001); *People v. McGhee*, 337 Ill. App. 3d 992, 996, 787 N.E.2d 324 (1<sup>st</sup> Dist. 2003); *People v. Blair*, 338 Ill. App. 3d 429, 788 N.E.2d 240 (1<sup>st</sup> Dist. 2003), leave to appeal allowed, 205 Ill. 2d 594, 803 N.E.2d 486 (2003). Early dismissal is only warranted where the petition lacks substantive merit, and may not be dismissed on

procedural grounds such as timeliness, waiver, or *res judicata*. *McGhee*, 337 Ill. App. 3d at 995-996; *Blair*, 338 Ill. App. 3d at 431-432.

However, as noted above, the circuit court has also correctly applied the standard for first stage proceedings in finding that Mr. O'Farrell's claims were frivolous and patently without merit. *See* 725 ILCS 5/122-2.1(a)(2) (West 2002). Since this was an appropriate standard for the court to apply at first stage proceedings, appellate counsel has determined that the issue of the use of an improper standard as part of the justification for dismissing the petition is without merit.

In addition, no argument can be made that the allegations in Mr. O'Farrell's petition were not frivolous or patently without merit. In his petition, O'Farrell maintained that his trial counsel was ineffective for failing to present the defense of inducement to commit suicide or argue that it was a lesser included offense of first degree murder, appellate counsel was ineffective for failing to raise trial counsel's ineffective assistance, and post-conviction counsel did not provide a reasonable level of assistance because she failed to raise both trial and appellate counsel's ineffective assistance in the amended petition. (C-4-33).

Claims for ineffective assistance of trial and appellate counsel in a post-conviction petition are measured by the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674, 104 S. Ct. 2052 (1984). Under *Strickland*, to establish a claim for ineffective assistance of counsel, a defendant must show that counsel's representation fell below an objective standard of reasonableness, and that counsel's actions resulted in prejudice to the defendant. *Strickland*, 466 U.S. at 687-688. The right to post-conviction counsel is wholly statutory, and thus, petitioners are entitled to only a "reasonable level of assistance," an issue that

is not cognizable under the Post-Conviction Hearing Act. *People v. Turner*, 187 Ill. 2d 406, 719 N.E.2d 725 (1999); *People v. Guest*, 166 Ill. 2d 381, 655 N.E.2d 873 (1995). Mr. O'Farrell has failed to state the gist of a claim that his attorneys were ineffective for failing to argue that he should have been convicted of inducement to commit suicide rather than first degree murder.

First, the offense of inducement to commit suicide is not a lesser included offense of first degree murder. A lesser included offense is "established by proof of the same or less than all of the facts or a less culpable mental state (or both), than that which is required to establish the commission of the offense charged." 720 ILCS 5/2-9(a) (West 2002). The offense of first degree murder requires that the defendant intentionally or knowingly kill another individual. 720 ILCS 5/9-1(a)(1) (West 2002). The offense of inducement to commit suicide, on the other hand, requires that the defendant coerce another individual to commit suicide, or intentionally provide the physical means or participate in the physical act by which another individual commits or attempts to commit suicide. 720 ILCS 5/12-31 (West 2002). Thus, inducement to commit suicide is not a lesser included offense of first degree murder.

Furthermore, the record does not support that the victim, Leslie O'Farrell, committed suicide. When the officers initially arrived at O'Farrell's home, he told them that he had been awakened by gunshots, saw a black male intruder standing over his wife, and struggled with the man into the hallway. (T.R.I-21-28, 43-50, 62-63). During the struggle, O'Farrell said that he was shot in the shoulder and believed that the intruder was also shot in the stomach. (T.R.I-28, 50-51, 62-63). The officers found O'Farrell's wife lying on the bed in the master bedroom with gunshot wounds in her head and chest. (T.R.I-29-32). The officers also discovered that the glass from the first floor bathroom window had been removed, there was a pile of flag stone and pieces of

lumber below the window, and a bullet hole in the hallway wall approximately the same height as the wound to O'Farrell's shoulder. (T.R.I-73-74, 81, 95-100, 109-110). Upon searching the home, the officers recovered a video cassette box from the master bedroom that contained a .22 caliber derringer pistol, three .22 caliber discharged shell casings, one live .22 caliber cartridge, and a hypodermic needle. (T.R.I-89-90, 101-103, 114-115, 117-120, 122-123).

Once confronted with this evidence, O'Farrell claimed that when he returned home from work that night, his wife pleaded with him to shoot her after she fell asleep. (T.R.I-149-150, 182). O'Farrell and his wife made a loose plan, his wife provided the weapon and came up with the story about the black male intruder, and at some point the glass was removed from the bathroom window. (T.R.I-149-150, 182-183, 195). The record shows that O'Farrell's wife did have a history of suicide attempts, suffered from several illnesses including diabetes, kidney failure, and Bell's Palsy, that both she and O'Farrell were in treatment for depression, and O'Farrell believed that his wife was terminally ill. (P.C.-75-76, 82-83, 86-88, 94-101; T.R.I-149, 182, 192; T.R.K-35-61). O'Farrell himself shot his wife in the head and chest, before shooting himself in the shoulder, putting the gun in the videocassette box, and calling the police. (T.R.I-150-152, 183-187). Thus, the record shows that Leslie O'Farrell did not commit suicide.

Therefore, trial counsel's failure to present the defense of inducement to commit suicide or argue that it was a lesser included offense of first degree murder could not have been ineffective assistance because there is no reasonable probability that had counsel made these arguments, the result of the proceeding would have been different. Since it has been determined that O'Farrell's trial counsel did not provide ineffective assistance, O'Farrell's additional claims that his appellate counsel provided ineffective assistance and that his post-conviction counsel did



No. 1-04-1094

IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,

Respondent-Appellee,

-VS-

THOMAS O'FARRELL,

Petitioner-Appellant.

Appeal from the Circuit Court  
of Cook County, Illinois.

No. 95 CR 30463.

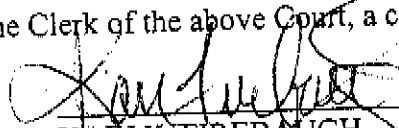
Honorable  
Michael P. Toomin,  
Judge Presiding.

**PROOF OF SERVICE**

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P.O. Box 99  
Pontiac, IL 61764

You are hereby notified that on June 3, 2005, we personally delivered the original and three copies of the attached Motion to Withdraw as Counsel on Appeal Pursuant to *Pennsylvania v. Finley* in the above-entitled cause to the Clerk of the above Court, a copy of which is hereby served on you.

  
KARI K. FIREBAUGH

Assistant Appellate Defender

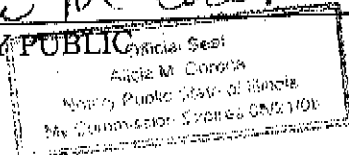
STATE OF ILLINOIS )  
 ) SS  
COUNTY OF COOK )

The undersigned, being first duly sworn on oath, deposes and says that he personally delivered the required number of copies of the attached Motion to the Clerk of the above Court and to the State's Attorney of Cook County on June 3, 2005.

  
CLERK

SUBSCRIBED AND SWORN TO BEFORE ME  
on June 3, 2005.

  
NOTARY PUBLIC





**NOTICE**

The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

No. 1-04-1094

IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 95 CR 30463
	)	
THOMAS O'FARRELL,	)	Honorable
	)	Michael P. Toomin,
Defendant-Appellant.	)	Judge Presiding.

O R D E R

Following a bench trial, defendant Thomas O'Farrell was convicted of first degree murder and sentenced to 50 years in prison. On direct appeal, this court affirmed defendant's conviction and sentence but modified the mittimus to reflect that defendant was to receive one day of good conduct credit for each day in prison. People v. O'Farrell, No. 1-97-0911 (1999) (unpublished order under Supreme Court Rule 23).

In January 2000, defendant filed a *pro se* petition for post-conviction relief, which was later amended by appointed post-conviction counsel. The State filed a motion to dismiss, which

1-04-1094

the circuit court granted.<sup>1</sup> After allowing defendant to file a late notice of appeal in 2004, this court affirmed the dismissal. People v. O'Farrell, No. 1-04-2481 (2005) (unpublished order under Supreme Court Rule 23).

In May 2003, defendant filed a second *pro se* successive post-conviction petition, which the court dismissed.<sup>2</sup>

In November 2003, defendant filed his third *pro se* successive post-conviction petition, which the circuit court dismissed. Defendant has appealed from that dismissal.

The State Appellate Defender, who represents defendant on appeal, has filed a motion for leave to withdraw as appellate counsel. A memorandum in support of the motion has been submitted pursuant to Pennsylvania v. Finley, 481 U.S. 551, 95 L. Ed. 2d 539, 107 S. Ct. 1990 (1987), in which counsel concluded that there are no issues of arguable merit. Defendant has responded.

We have carefully reviewed the record in this case, the aforesaid memorandum and defendant's response in compliance with the mandate of the Finley decision and find no issues of arguable merit. Therefore, the motion of the State Appellate Defender for

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<sup>1</sup>While defendant's first post-conviction petition was pending in the circuit court, defendant filed an appeal, which he subsequently moved to dismiss. This court allowed the dismissal. People v. O'Farrell, No. 1-00-0968 (2001) (dispositional order).

<sup>2</sup>Defendant filed appeals of the court's dismissal of his second post-conviction petition, but then moved to dismiss the appeals, which this court allowed. People v. O'Farrell, Nos. 1-03-2619 and 1-03-3404 (2004) (dispositional orders).

1-04-1094

leave to withdraw as counsel is allowed.

The judgment of the circuit court of Cook County is affirmed.

Affirmed.

BURKE, J., with GORDON and McBRIDE, JJ., concurring.



ORIGINAL

NO. 101736

IN THE SUPREME COURT OF ILLINOIS

PEOPLE <del>OF THE</del> STATE OF ILLINOIS,	)	Appellate Court,
	)	First District
Respondent,	)	No. 1-04-1094
	)	
V.	)	Circuit Court,
	)	Cook County
THOMAS O'FARRELL,	)	No. 95 CR 30463
	)	
Petitioner,	)	Hon. Michael P. Toomin,
	)	Judge Presiding.

PETITION FOR LEAVE TO APPEAL

Thomas O'Farrell  
Reg. No. K-54340  
P.O. Box 99  
Pontiac, Illinois 61764

FILED

DEC 12 2005

SUPREME COURT CLERK

35-120505

R-103105

No RH

EXHIBIT CC

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IN THE  
SUPREME COURT OF ILLINOIS

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PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit
Plaintiff-Appellee,	)	Court of Cook County,
	)	Illinois.
	)	
V.	)	No. 95 CR 30463
	)	
THOMAS O'FARRELL,	)	Honorable
Defendant-Appellant,	)	Michael P. Toomin,
	)	Judge Presiding.

---

PETITION FOR LEAVE TO APPEAL

1.  
PRAYER FOR LEAVE TO APPEAL

Your Petitioner, Thomas O'Farrell, Pro-Se, respectfully petitions this Honorable Court for Leave to Appeal pursuant to Supreme Court Rule 315, from the judgement of the Illinois Appellate Court, First Judicial District, which affirmed the summary dismissal of his Pro-Se Petition for Post-Conviction Relief by the Circuit Court of Cook County, Illinois.

2.  
OPINION AND PROCEEDINGS BELOW

On January 21, 1997, following a bench trial, Petitioner, Thomas O'Farrell was convicted of first degree murder. On February 28, 1997, Petitioner was sentenced to 50 years in prison. On March 24, 1999, on direct appeal, the Appellate Court, First Judicial District, affirmed Petitioner's conviction and sentence but modified the mittimus to reflect that Petitioner was to receive one day good conduct credit for each day on prison. People v. O'Farrell, No. 1-97-0911 (1999)



(unpublished order under Supreme Court Rule 23). Petitioner sought further review from this Honorable Court, however his petition for leave to appeal was denied on February 2, 2000. (People v. O'Farrell, 187 Ill.2d 585, 724 N.E.2d 1273 (2000)). On January 25, 2000, Petitioner filed a pro-se petition for post-conviction relief, which was later amended by appointed post-conviction counsel. The state filed a motion to dismiss, which the circuit court granted. (People v. O'Farrell, No. 1-00-0968 (2001)(dispositional order). After allowing Petitioner to file a late notice of appeal in 2004, the Appellate Court, First Judicial District affirmed the dismissal. (People v. O'Farrell, No. 1-04-2481 (2005)(unpublished order under Supreme Court Rule 23). On May 21, 2003, Petitioner file a successive post-conviction petition (Petitioner's second petition over'all), which was dismissed as moot as the Appellate Court, First Judicial District allowed Petitioner to file a late appeal. (People v. O'Farrell, No.'s 1-03-2619 and 1-03-3401 (2004)(dispositional order). On November 7, 2003, Petitioner filed a second successive post-conviction petition (Petitioner's third petition over'all). On January 8, 2004, Petitioner filed a notice of appeal with the circuit court clerk upon the January 2, 2004 dismissal of the circuit court. The clerk of the circuit court held and later filed Petitioner's notice of appeal on April 13, 2004. On May 22, 2005, Petitioner filed a motion to proceed on appeal pro-se, which was subsequently denied by the Appellate Court, First Judicial District. On June 3, 2005, Appellate

counsel filed a motion for leave to withdraw as appellate counsel. A memorandum in support of the motion was submitted pursuant to Pennsylvania v. Finley, 481 U.S. 551, 95 L.Ed.2d 539, 107 S.Ct. 1990 (1987). Petitioner was ordered to respond, and did. The Appellate Court, First Judicial District granted appellate counsel's motion and allowed her to withdraw and affirmed the judgement of the circuit court. (People v. O'Farrell, No. 1-04-1094. On October 20, 2005, the Clerk of the Illinois Supreme Court filed Petitioner's petition for leave to appeal in Case No. 1-04-2483, Ill. S.Ct. No. 101468, which is still pending a ruling. On November 5, 2005, Petitioner filed an affidavit of intent to file a petition for leave to appeal to the Illinois Supreme Court in Case No. 1-04-1094. This appeal follows.

### 3.

#### POINTS RELIED UPON FOR REVERSAL

1. Whether the Appellate Court erred in failing to recognize that Inducement To Commit Suicide qualifys as a lesser included offense of First Degree Murder.

2. Whether the Appellate Court erred in failing to recognize that Petitioner had a Constitutional Right to have the defense of Inducement to commit suicide and it's vital evidence presented to a jury at trial for their consideration.

3. Whether the Trial Court erred in failing to recognize the intentions of the Illinois Governor and General Assembly in drafting and enacting the Laws and Statutory Requirements for the offense of Inducement To Commit Suicide.

4. Whether the Appellate Court erred in denying

**Petitioner's Pro-Se Motion To Proceed On Appeal Pro-Se.**

5. Whether the Appellate Court erred in failing to recognize that Petitioner stated a meritorious claim within his response to appellate counsel's motion for leave to withdraw as appellate counsel.

6. Whether the Appellate Court erred in failing to recognize the Trial Court erred in dismissing Petitioner's pro-se successive post-conviction petition as frivolous and patently without merit, where Petitioner stated a gist of a Constitutional claim.

4.

**STATEMENT OF FACTS**

On November 7, 2003, Petitioner filed his third pro-se post-conviction petition. In this petition, Petitioner maintained that he should have been charged and sentenced for the offense of Inducement To Commit Suicide pursuant to 720 ILCS 5/12-31(a)(2)(ii)(2002), which carries a sentencing range of one to three years imprisonment, as Petitioner confessed to intentionally participating in the physical act of assisting his wife, Lesley in her suicide. Petitioner argued that trial counsel was ineffective for failing to present this as a defense and/or lesser included offense of first degree murder along with its vital evidence which trial counsel knew prior to pre-trial motion and trial. Petitioner further argued that both appellate counsel and post-conviction counsel failed to provide a reasonable level of assistance for failing to raise said issue within Petitioner's direct appeal and post-conviction petition to preserve said issue for later review. Petitioner argued that

fundamental fairness required the relaxation of the waive doctrine as Petitioner demonstrated that the combination of trial counsel's, appellate counsel's post-conviction counsel's ineffectiveness and his severe dyslexia affected his ability to raise the specific claim he is now asserting within in his original proceedings, which is "cause". Petitioner demonstrated that the combination of the denial of his Constitutional Right to appeal said issue further and being convicted of an offense which he did not commit and was sentenced to a term 47 years over the statutory maximum for the actual offense Petitioner confessed to was "prejudice". In support, Petitioner attached affidavits of his father, mother, sister and himself which included vital evidence to prove the allegations within his petition. Petitioner also included a affidavit from inmate Michael Sapp which supports the claim of dyslexia.

On January 2, 2004, the circuit court summarily dismissed Petitioner's petition, finding that he claims raised were barred by the doctrine of waiver and were frivolous and without merit. The circuit court stated that Petitioner failed to demonstrate "cause" or "prejudice" to relax the waiver doctrine. The circuit court further stated that Petitioner failed to prove ineffective assistance of counsel pursuant to Strickland v. Washington. The circuit court failed to recognize the attached affidavits which served as the vital evidence that proved Petitioner's claim. Relying only on the evidence presented at trial, the circuit court adamantly stated that "the victim, Lesley O'Farrell, did not commit or attempt to commit suicide". And Petitioner "shot and killed his wife as she lay helpless in

her bed". As to Petitioner's claim that Inducement To Commit Suicide is a lesser included offense of first degree murder, the circuit court stated that "Petitioner clearly misapprehends the thrust of the statute. Contrary to Petitioner's analysis, the enactment cannot be construed as a lesser-included offense of first degree murder. A lesser included offense is 'an offense which is established by the same or less than all of the facts or a less culpable mental state (or both), than that which is required to establish the commission of the offense charged...' 720 ILCS 5/2-9(a)(West 2003). The offense of homicide requires that the defendant intentionally or knowingly kill the victim (720 ILCS 5/9-1(a)(1)(West 2003)), while the offense of inducement to commit suicide merely requires that the defendant either coerce the victim to committing suicide or provide the means for such. 720 ILCS 5/12-31(West 2003)."

On January 8, 2004, Petitioner filed a notice of appeal with the clerk of the circuit court. The circuit court clerk did not file said notice of appeal or send a copy to the clerk of the appellate court until April 13, 2004, at which time the appellate court appointed the State Appellate Defenders Office to represent Petitioner in his appeal. On May 22, 2005, Petitioner filed a pro-se motion to proceed on appeal pro-se. Petitioner argued that appellate counsel as of May 22, 2005 did not yet file a brief and stated that Petitioner has a right to represent himself during legal proceedings pursuant to *Farretta v. California*. On June 3, 2005, appellate counsel filed a motion to withdraw as counsel on appeal pursuant to *Pennsylvania v. Finley*. Appellate

counsel within her motion agreed with the ruling of the circuit court and requested to withdraw as appellate counsel. On October 31, 2005, the appellate court stated "In November 2003, defendant filed his third pro-se successive post-conviction petition, which the circuit court dismissed. Defendant has appealed from that dismissal. The State Appellate Defender, who represents defendant on appeal, has filed a motion for leave to withdraw as appellate counsel... counsel concluded that there are no issues of arguable merit. Defendant has responded." The appellate court ruled "we carefully reviewed the record in this case, the aforesaid memorandum and defendant's response in compliance with the mandate of the Finley decision and find no issues of arguable merit. Therefore, the motion of the State Appellate Defender for leave to withdraw as counsel is allowed. The judgement of the circuit court of Cook County is affirmed."

Upon receiving the order of the appellate court, Petitioner filed an affidavit of intent to file a petition for leave to appeal to the Illinois Supreme Court on November 5, 2005.

##### 5. ARGUMENTS

1. THE APPELLATE COURT ERRED IN FAILING TO RECOGNIZE THAT INDUCEMENT TO COMMIT SUICIDE QUALIFYS AS A LESSER INCLUDED OFFENSE OF FIRST DEGREE MURDER.

This Honorable Court in People v. Novak, 163 Ill.2d 93, 643 N.E.2d 762 (1994), adopted an approach concerning the charging instrument. In order for a crime to be a lesser included offense of another, its elements must be described in the charging instrument of the greater. "The 'lesser offense must have a

broad foundation in the instrument charging the greater,' or at least 'set out the main outline of the lesser offense.'" Novak, 163 Ill.2d at 107 quoting People v. Bryant, 113 Ill.2d 497, 505, 499 N.E.2d 413 (1983). Significantly, Bryant goes on to say in the very same paragraph that the fact "that the indictment did not, expressly allege all the elements of the lesser offense is not, in our view, fatal under these circumstances[.]"

In the case at bar, the indictment alleged that Petitioner "without lawful justification, intentionally or knowingly shot and killed Lesley O'Farrell with a gun. . ." Petitioner contends that this language sufficiently outlines the elements of inducement to commit suicide. Enough so to qualify it as a lesser included offense of the first degree murder count.

Chapter 720 ILCS 5/12-31(a)(2)(ii) reads in relevant part:

12-31. Inducement to Commit Suicide.

(a) A person commits the offense of inducement to commit suicide when he or she does either of the following:

(2) With knowledge that another person intends to commit or attempts to commit suicide, intentionally

(ii) participates in the physical act by which another person commits or attempts to commit suicide. 720 ILCS 5/12-31(a)(2)(ii)(West 1996) (emphasis added).

The language of the statute clearly indicates that a person is guilty of inducement to commit suicide if he or she "intentionally participates in the physical act by which another person commits suicide." The language of the indictment expressly outlines this conduct. Petitioner never claimed that he did not participate in the shooting of his wife, Lesley. ■

Petitioner in fact confessed that, after years of watching Lesley suffer -- both physically and emotionally with her ailments -- he finally agreed to help her end her life, thus ending Lesley's suffering. (Tr.I-182). Because "intentionally or knowingly [shooting] Lesley O'Farrell with a gun" could arguably include "intentionally participat[ing] in the physical act by which another person commits suicide," inducement to commit suicide must be a lesser included offense of first degree murder in this case. Thus, both the trial court's and appellate court's ruling contrary to the fact was erroneous.

2. THE APPELLATE COURT ERRED IN FAILING TO RECOGNIZE  
 THAT PETITIONER HAD A CONSTITUTIONAL RIGHT TO  
 HAVE THE DEFENSE OF INDUCEMENT TO COMMIT SUICIDE  
 AND IT'S VITAL EVIDENCE PRESENTED TO A JURY AT  
 TRIAL FOR THEIR CONSIDERATION.

This Honorable Court set a well settled principle of law in People v. DeRosa, 378 Ill. 557, 39 N.E.2d 1 (1941), that a criminal defendant has a right to present as many defenses as he has or thinks he has, even if he offers these defenses for no other purpose than to confuse the jury. A criminal defendant may even present incongruous or inconsistent defenses, although he must bear the burden of any detrimental effect the decision to do so carries. People v. Smith, 121 Ill.App.2d 105, 110, 257 N.E.2d 261 (1970).

In this case at bar, there was substantial and uncontradicted evidence which established that the victim had made several attempts to end her own life. A great deal of this documentation was attached to Petitioner's petition. The victim's lack of



success is due primarily to Petitioner's intervention, a fact that is also well documented. Given this evidence, and the fact that it is uncontradicted, it was objectively unreasonable for counsel not to pursue a defense which centered on this evidence. In prosecutions for homicide where suicide of deceased is relied as a defense the deceased's conduct, declarations, and threats indicating a suicidal disposition are generally admitted into evidence for the purpose of showing the deceased's state of mind or intention. 40A Am Jur2d Homicide § 287 (Suicide). Through the well documented suicide attempts, statements by the victim, Lesley O'Farrell and the confession of Petitioner this evidence would further corroborate a defense of inducement to commit suicide. The State will certainly contend that Petitioner committed murder with premeditation (Tr.J-4 & J-22) but in doing so the State must rely on the testimony of State's Witness, Thomas Dye. (Tr.K8 & K29). However, the State must be barred from the use of this witness in these proceedings as the appellate court ruled that the trial court was in the best position to assess Dye's credibility. (Mar. 24, 1999 opinion pg. 16) Within the trial court's order dated October 4, 2001, pg. 14, the trial court "placed utterly no reliance upon Dye's proffers." And within Mr. Dye's deposition, he admits that ex-assistant State's Attorney, now Appellate Justice, Patrick Quinn pressured him into lying in Petitioner's case and gave him the vital evidence that Quinn needed Dye to testify to. (see attached deposition). The question of Dye's credibility, whether or not Petitioner is guilty of inducement to commit suicide of first degree murder,

the weight of Petitioner's additional vital evidence, or whether or not the victim, Lesley O'Farrell committed suicide is clearly critical evidence and questions to be brought before a jury at trial for their consideration. Therefore, both the trial court and the appellate court erred again in their rulings.

3. THE TRIAL COURT ERRED IN FAILING TO RECOGNIZE THE INTENTIONS OF THE ILLINOIS GOVERNOR AND GENERAL ASSEMBLY IN DRAFTING AND ENACTING THE LAWS AND STATUTORY REQUIREMENTS FOR THE OFFENSE OF INDUCEMENT TO COMMIT SUICIDE.

The Petitioner confessed that, after years of watching his wife, Lesley suffer -- both physically and emotionally with her ailments -- he finally agreed to help her end her life, thus ending Lesley's suffering, (Tr.I-182) thus, assisting her suicide.

Thirty-six states and territories currently have statutes imposing criminal sanctions for aiding, assisting, causing, or promoting suicide. (FN10). Compassion in Dying v. State of Washington, 79 F.3d 720 at 847. (FN10) Ill.Rev.Stat. Ch. 720 ¶ 5/12-31(Westlaw 1996), Compassion in Dying, 79 F.3d 720 at 858. Most states have consistently punished the act of assisting a suicide as either a common-law or statutory crime and some continue to view suicide as an unpunishable crime. (FN14). Washington v. Glucksberg, 117 S.Ct 2258 at 2286. (U.S.Wash. 1997) (FN14) Ill.Comp.Stat., Ch. 720 § 5/12-31(1993), Glucksberg, 117 S.Ct. 2258 at 2293.

The State of Illinois in July 1990, drafted and enacted a statutory Law regarding coercing , intentionally providing the means and intentionally participating in another person in committing suicide.

It is clear that the Governor and General Assembly of Illinois gave careful consideration in wording and determining the statutory requirements and their intent in drafting and enacting the Laws and the proper statutory sentences for the offense of inducement to commit suicide. (Public Act 86-980, 87-1157, 88-392, Ch. 38 ¶ 12-31 and 720 ILCS 5/12-31 (1990-1993)). From it's birth in July 1990, the offense of inducement to commit suicide went through several amendment, where the Governor and General Assembly changed the statutory requirements to be met by a defendant and the statutory sentence for said offense. On the date of Petitioner's offense the statute read as follows:

5/12-31. Inducement to Commit Suicide.

§12-31. Inducement to Commit Suicide.

(a) A person commits the offense of inducement to commit suicide when he or she does either of the following:

(1) Coerces another to commit suicide and the other person commits or attempts to commit suicide as a direct result of the coercion, and he or she exercises substantial control over the other person through (i) control of the other person's physical location or circumstances; (ii) use of psychological pressure; or (iii) use of actual or ostensible religious, political, social, philosophical or other principles.

(2) With the knowledge that another person intends to commit or attempts to commit suicide, intentionally

(i) offers and provides the physical means by which another person commits or attempts to commit suicide, or (ii) participates in the physical act by which another person commits or attempts to commit suicide.

For the purpose of this Section, "attempts to commit suicide" means any act done with the intent to commit suicide and which substantial steps toward commission of suicide.

and the statutory sentencing guidelines and appropriate sentence for the offense of inducement to commit suicide is a Class 4 felony which reads as follows:

§ 5/5-8-1 Sentencing of imprisonment for felony.

(7) for a Class 4 felony, the sentence shall be not less than 1 year and not more than 3 years.

Petitioner offered the necessary proof within his successive post-conviction petition that the victim did in fact commit suicide.

Within Petitioner's confession, he admitted to physically participating in his wife, Lesley's suicide when he fired the fatal shot into his wife, Lesley.

720 ILSC 5/12-31(a)(2)(ii), inducement to commit suicide can no better describe Petitioner's action and offense as well as the degree of intent required for said offense. The drafting and enacting of inducement to commit suicide by the Governor and General Assembly clearly demonstrates their intent and that those who commit the acts/offense as Petitioner committed should be charged under 720 ILCS 5/12-31(a)(2)(ii) and not under 720 ILCS 5/9-1(a)(1) nor 5/9-1(a)(2) first degree murder. The argument above clearly points out that the trial court and appellate court erred here as well.

4. THE APPELLATE COURT ERRED IN DENYING  
PETITIONER'S PRO-SE MOTION TO  
PROCEED ON APPEAL PRO-SE.

Petitioner was appointed the State Appellate Defender to represent him on the appeal of his second successive post-conviction petition. From the beginning appellate counsel was of the opinion that Petitioner claim had no merit. Petitioner on several occasions spoke with counsel and even wrote counsel to show how 720 ILCS 5/12-31(a)(2)(ii) applied to his case. Appellate counsel repeatedly told Petitioner that he was wrong and explained that this statute only applied if Petitioner coerced the victim into taking her own life. Counsel informed Petitioner that if she could not find any supporting caselaw to support Petitioner's claim, she would not file a brief in this case at bar.

Concerned that appellate counsel would file a motion to withdraw as counsel under Pennsylvania v. Finely, 107 S.Ct 1990, waiving Petitioner's rights for further review on said claim, Petitioner file a motion to proceed on appeal pro-se and placing same in the institutional mail at the Pontiac Correctional Center on May 22, 2005. (see attached) Within said motion, Petitioner requested the right to represent himself pursuant to Faretta v. California, 95 S.Ct. 2525.

The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. Although not stated in the Amendment in so many words, the right to self-representation -- to make one's own defense personally -- is thus necessarily implied by the structure in the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails, Faretta v. California, 95 S.Ct. 2525 at 2533.

Had Petitioner knew of 720 ILCS 5/12-31(a)(2)(ii) and the ruling of the United States Supreme Court in Faretta, Petitioner would have sought to represent himself at trial. However, this is not the situation here, Petitioner did not know the above at trial but he definitely knew during the appeal of his second successive petition and in fact he motioned the appellate court prior to appellate counsel filing her motion to withdraw which was filed on June 3, 2005.

In the case at bar, trial counsel was made aware of the vital evidence which would have supported Petitioner defense of inducement to commit suicide, 720 ILCS 5/12-31(a)(2)(ii).

However, trial counsel failed to introduce said evidence at trial. Instead, trial counsel presented no viable defense. (Tr.I-198).

The evidence presented in Petitioner's second successive petition supports that the victim, Lesley O'Farrell did in fact commit suicide and in doing so enlisted her husband, Petitioner in assisting said suicide.

There is additional burden on loved ones and family members that is often overlooked. Some terminally ill persons enlist their children, parents, or others who care for them deeply, in an agonizing, brutal and damaging endeavor, criminalized by the state, to end their pain and suffering. The loving and dedicated persons who agree to help -- even if they are fortunate to avoid prosecution, and almost all are -- will likely suffer pain and guilt for the rest of their lives., Compassion in Dying, 79 F.3d 720 at 836.

A mercy killing as defined by Blacks is the affirmative act of bringing about immediate death allegedly in a painless way and generally administered by one who thinks the dying person wishes to die because of a terminal or hopeless disease or condition. Euthanasia as defined by Blacks is the act or practice of killing or bringing about death of a person who suffers from an incurable disease or condition, especially a painful one, for reasons of mercy.

The Petitioner stated within his confession that he believed that his wife, Lesley was terminally ill and that Lesley had numerous medical conditions. (Tr.I-182) An expert witness testified at sentencing only that the victim, Lesley O'Farrell

had feelings of worthlessness as a woman, was frustrated with her health conditions, depressed, had diabetes which resulted in kidney and vision problems, and had partial facial paralysis from Bell's Palsy. The expert witness also testified that a person suffering a major depression might over-emphasize the illnesses the victim, Lesley O'Farrell experienced and could suffer suicide thoughts. (Tr.K-60-61)

Unfortunately everyday somewhere in the world individuals commit suicide and do so in the comforts of their own home and even beds. Most consume lethal doses of medications and in some cases individuals enlisted the assistance of Dr. Jack Kevorkian to provide the lethal dosage of medications and instruct the person as how to end their lives. In the assisted suicide of Thomas Youk, Dr. Kevorkian altered his norm of only giving the patients the drugs and equipment with which they could kill themselves (assisted suicide), to personally giving Mr. Youk a direct injection of lethal substances (murder in the eyes of Michigan law.) Dr. Kevorkian was sentenced to serve 15-25 years imprisonment in the State of Michigan for second degree murder. (see attached)

Unlucky to Petitioner, Michigan law is diferent than Illinois law. Had Dr. Kevorkian committed the same act in Illinois he would have met the requirements of 720 ILCS 5/12-31(a)(2)(ii) inducement to commit suicide as he intentionally participated in the physical act by which another person commits or attempts to commit suicide. Although Petitioner had no access to the drugs and equiptment Dr. Kevorkian had access to, Petitioner used the only means that was provided him by his wife, Lesley,

a gun and in the manner that Dr. Kevorkian personally injected Mr. Youk with the lethal substances, Petitioner personally fired the fatal shot that ended his wife, Lesley's life. Therefore, Petitioner has proven that he met the requirements for inducement to commit suicide 720 ILCS 5/12-31(a)(2)(ii) and had a right to said defense.

Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense. Faretta, 95 S.Ct. 2525 at 2533.

The United States Supreme Court ruled in forcing Faretta, under these circumstances, to accept against his will a state-appointed public defender, the California courts deprived him of his Constitutional right to conduct his own defense. Faretta, 95 S.Ct. 2525 at 2541. Therefore the appellate court erred in denying Petitioner his Constitutional right to represent himself on appeal.

5. THE APPELLATE COURT ERRED IN FAILING TO RECOGNIZE THAT  
 PETITIONER STATED A MERITORIOUS CLAIM WITHIN HIS  
 RESPONSE TO APPELLATE COUNSEL'S MOTION FOR LEAVE TO  
 WITHDRAW AS APPELLATE COUNSEL.

Within appellate counsel's motion for leave to withdraw as counsel, counsel argued that trial court did not err in dismissing Petitioner's second successive petition. Appellate counsel agreed that Petitioner's petition failed to state a gist of a Constitutional claim and that petition was frivolous and patently without merit. However, appellate counsel's assertion is incorrect as a matter of law.



Within Petitioner's response to said motion, Petitioner stated that the trial court erred in summarily dismissing Petitioner's pro-se successive post-conviction petition as frivolous and patently without merit, where the petition clearly stated the gist of a Constitutional claim. Petitioner argued the denial of effective assistance of counsel at trial, in violation of the Sixth Amendment, when trial counsel refused to present at trial that Petitioner was not guilty of first degree murder but was in fact guilty of the lesser included offense of inducement to commit suicide. However, when the trial court dismissed the petition the trial court stated that there was no evidence presented at trial that would substantiate Petitioner's claim that the victim, Lesley O'Farrell committed suicide, inducement to commit suicide is not a lesser included offense of first degree murder and because of such, Petitioner was not denied effective assistance of counsel. The trial court further went on to rule Petitioner failed satisfy the two prong test of Strickland v. Washington, 104 S.Ct. 2052 to prove either trial counsel was ineffective or that Petitioner's outcome would have changed. Therefore Petitioner failed to prove either "cause" or "prejudice" to relax the waiver doctrine pursuant to People v. Pitsonbarger, 793 N.E.2d 609.

However, the trial court erred as Petitioner clearly presented a gist of a Constitutional claim pursuant to People v. Coleman, 701 N.E.2d 1063 and that a Petitioner is not expected to construct legal arguments, cite legal authority, or draft a petition as artfully as counsel would pursuant to People v. Lemons, 6f3 N.E.2d 1234. Petitioner also alleged the bare-

bones structure of a claim of the deprivation of his Constitutional right which was not contradicted by anything appearing in the record pursuant to People v. Seaberg, 635 N.E.2d 126,130.

In the case at bar, there was no evidence presented at trial or within the record that contradicts Petitioner's claim that he assisted in his wife, Lesley's suicide. However, the trial court stated that there was no evidence presented at trial to support Petitioner's claim that his wife, Lesley committed suicide. But, Petitioner did not have to prove his innocence at trial at this juncture. Simply, the additional evidence within affidavits attached to petition which confirms victims suicidal mental state and that trial counsel knew of these facts prior to trial but yet choose to not present it at trial to prove Petitioner was not guilty of the offense of first degree murder clearly constitutes a gist of a Constitutional claim to survive dismissal.

The evidence contained within this petition clearly demonstrates ineffective assistance of counsel at trial to satisfy the first prong of Strickland. And Constitutionally ineffective assistance of counsel ... is "cause", People v. Flores, 606 N.E.2d 1078 at 1085, which satisfies "cause" within the meaning of Pitsonbarger. Furthermore, Petitioner is a severe dyslexic which impeded him from including the claim within his second successive petition in his first post-conviction petition. Petitioner within his response to appellate counsel's motion for leave to withdraw as counsel on appeal formed a proper argument to assist the appellate court in better understanding this disease. Pitsonbarger defines "cause" as a fundamental deficiency in the first post-conviction proceedings, the Petition must show that the deficiency affected

his ability to raise the specific claim now asserted. Pitsonbarger, note #18. Petitioner asserts that his dyslexia affected his ability to raise said claim within his first petition, which also satisfies "cause" within the meaning of Pitsonbarger.

Clearly if trial counsel would have presented the defense of inducement to commit suicide 720 ILCS 5/12-31(a)(2)(ii) at trial, Petitioner would not have been convicted for the offense of first degree murder and not sentenced to a 50 year prison term. This would satisfy the second prong of Strickland. "Prejudice", in the context, would occur if the petitioner were denied consideration of an error that so infected the entire trial that the resulting conviction or sentence violates due process., Pitsonbarger, note #25. Trial counsel's ineffectiveness for failing to present the viable defense of inducement to commit suicide and its vital evidence infected the entire trial and sentencing to satisfy "prejudice" within the meaning of Pitsonbarger. Therefore, the waiver doctrine should have been relaxed in order for Petitioner to succeed the first stage of post-conviction relief.

The Illinois Post-Conviction Hearing Act makes provisions for claims of actual innocence advanced by post-conviction petitioners, 725 ILCS 5/122-1(c)(West 2005). In this case at bar, Petitioner is contending that he is actually innocent of first degree murder, and trial counsel failed to advance the defense of inducement to commit suicide which would have proved this fact.

Furthermore, Petitioner's claim warrants review under the plain error doctrine. See People v. Ross, 709 N.E.2d 621.

Moreover, the facts as alleged within Petitioner's pro-se petition were sufficient to satisfy the "prejudice" prong of the new Illinois Post-Conviction Hearing Act Statute, and advance the petition to the second stage of post-conviction review. Not to mention how "prejudicial" it is that the Petitioner did not commit the offense of first degree murder and yet he must remain imprisoned for an additional 14-15 years simply because trial counsel failed to represent Petitioner with the zeal required by the Constitution. For the above reasons, appellate court erred in granting appellate counsel leave to withdraw as counsel on Petitioner's appeal.

6. THE APPELLATE COURT ERRED IN FAILING TO RECOGNIZE THE TRIAL COURT ERRED IN DISMISSING PETITIONER'S PRO-SE SUCCESSIVE POST-CONVICTION PETITION AS FRIVOLOUS AND PATENTLY WITHOUT MERIT, WHERE PETITIONER CLEARLY STATED A GIST OF A CONSTITUTIONAL CLAIM.

Within Petitioner's second successive petition he attached supporting affidavits which confirm that Petitioner and his family informed trial counsel of the victim, Lesley O'Farrell's several past suicide attempts, mental state of mind prior to her death, and that Lesley consistently plead with Petitioner to help her end her life because she no longer wanted to live with the pain and suffering that she was going through due to her several medical conditions.

Armed with this vital information, which trial counsel knew prior to trial, trial counsel failed to present said evidence which would prove Petitioner to be innocent of first degree murder during the trial proceedings allowing Petitioner to be

convicted and sentenced for an offense he did not commit.

Petitioner within his petition unequivocally proved that he met the requirements of 720 ILCS 5/12-31(a)(2)(ii) inducement to commit suicide, where Petitioner intentionally participated in physical act by which his wife, Lesley committed suicide. (see argument #1 within) Petitioner's confession also confirms that Petitioner assisted in Lesley's suicide. (Tr.I-182)

Within Petitioner's response to appellate counsel's motion for leave to withdraw as counsel on appeal, Petitioner further demonstrated through People v. Coleman, 701 N.E.2d 1063, People v. Lemon, 613 N.E. 2d 1234 and People v. Seaberg, 635 N.E.2d 126, 130 that Petitioner did in fact present a gist of a Constitutional claim sufficient enough to survive summary dismissal on his petition. (see attached)

To further assist the appellate court, Petitioner relied on People v. Novak, 643 N.E.2d 762 and People v. Bryant, 499 N.E.2d 413 to show that 720 ILCS 5/12-31(a)(2)(ii) qualifies as a lesser included offense of first degree murder which contradicts the trial court ruling to prove err. (see attached and argument #1 within) Due to the foregoing reasons the appellate court erred in allowing appellate counsel to withdraw on Petitioner's appeal.

6.  
CONCLUSION

Based on the foregoing arguments, Petitioner prays that this Honorable Court will grant him leave to appeal to address the questions presented herein



~~Westlaw~~

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844 N.E.2d 970 (Table)  
217 Ill.2d 618, 844 N.E.2d 970 (Table), 300 Ill.Dec. 527  
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(The decision of the Court is referenced in the  
North Eastern Reporter in a table captioned  
"Supreme Court of Illinois Dispositions of Petitions  
for Leave to Appeal".)

Supreme Court of Illinois

People

v.

Thomas O'Farrell

NO. 101736

JANUARY TERM, 2006

January 25, 2006

Lower Court: No. 1-04-1094

Disposition: Denied.

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